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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re CHESEBROUGH'S TRADE-MARK "VASELINE."

C. A. 1902 *Feb.* 28: *March* 1, 3, 24.

Trade-mark—Old Mark—Invented Word—Invented Article—"Special and Distinctive Word"—Word distinctive of Manufacturer—Exclusive User—Patented Invention—Expiration of Patent—Rectification of Register—Motion to expunge Trade-mark—User before 1875*—Onus of Proof—Appeal—Further Evidence—Trade Marks Registration Act,* 1875 (38 *&* 39 *Vict. c.* 91), *s.* 10.

In 1877 a chemical manufacturer registered, under the Trade Marks Registration Act, 1875, the word "Vaseline," which had been invented by him to denote a product of his manufacture, the word being registered as an old mark used by him for six years before 1877.

Upon an application made in 1900 by a rival manufacturer for the removal of the mark from the register:—

Held, by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting, that the word had been properly registered as a "special and distinctive word" within s. 10 of the Act of 1875, since the applicant failed to shew that the word had not been used by itself as a trade-mark before the Act, whereas the evidence shewed that the word had always been used before and since the passing of the Act to denote, not an article manufactured by a particular process, but an article identified with the name of the particular manufacturer.

Whether, when an inventor invents a new article, and at the same time invents a word to designate it, he can claim the exclusive use of that word to denote his own manufacture, *quære*.

Where a person is seeking to remove a trade-mark from the register, the onus is upon him to prove that it ought to be taken off, not upon

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CHESEBROUGH'S TRADE-MARK "VASELINE," *In re.*

the party registered to make out his right to retain it on the register; and especially so where the mark has been on the register for many years.

Linoleum Manufacturing Co. v. *Nairn*, (1878) 7 Ch. D. 834, distinguished.

Decision of Buckley J. reversed upon further evidence adduced, by leave, on the appeal.

THIS was an appeal from an order made by Buckley J. directing that the register of trade-marks should be rectified by the removal therefrom of the trade-mark "Vaseline."

The word "Vaseline" was invented by one Robert Augustus Chesebrough of New York, a manufacturer of toilet petroleum preparations, and was given by him to a petroleum product of his manufacture. In 1877 he registered the word as a trade-mark in Classes 3, 4, 47, and 48, under the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), in connection with the article then known as petroleum jelly, but now commonly called "Vaseline." The word was registered as an old mark, it having been in use for six years before March 8, 1877. Previously, in 1872, R. A. Chesebrough had taken out in America a patent for an invention of a product from petroleum which he therein termed "Vaseline"; and in 1874 he took out in England a patent claiming (amongst other things) the manufacture of a material which he also therein termed "Vaseline." This patent expired in 1888. The mark "Vaseline" was subsequently assigned to its present proprietors, the Chesebrough Manufacturing Company Consolidated of New York, manufacturers of preparations of petroleum jelly and refiners of petroleum products, the company being in fact R. A. Chesebrough's successors in business.

The case came before Buckley J. upon a motion, the notice of which was dated January 31, 1900, to rectify the register by one Edward Theodore Pearson, a manufacturing chemist, who himself applied for registration of the word "Vasogen" as a trade-mark in Class 3 in respect of chemical substances prepared for use in medicine and pharmacy. The motion and the application were heard together before Buckley J., the question argued being whether the word "Vaseline" was a "special and distinctive word" within s. 10 of the Act of 1875,

which says that "any special and distinctive word or words . . . . used as a trade-mark before the passing of this Act may be registered as such under this Act"—the meaning of the word "distinctive" being, according to the authorities, distinctive of the person using the mark, and not distinctive of the goods sold under it; and whether, therefore, having regard to the circumstances of the case, the word "Vaseline" was, at the date of registration, improperly placed upon the register as an old mark under the Act. In delivering judgment, Buckley J. said the difficulty in the case was that, the question being purely one of fact, the evidence before him was "meagre and unsatisfactory to the last degree." Upon such evidence, however, as there was before him the learned judge held it to have been established as a fact that the word "Vaseline" was in 1877 used "as indicating, not the manufacture of a particular firm, but the petroleum jelly as manufactured by a particular process"; and consequently that, on the authority of *Linoleum Manufacturing Co.* v. *Nairn* (1), and other similar cases, the mark ought to be removed. From that decision the Chesebrough Company appealed. After the appeal had been entered, the Court of Appeal, upon an application by the Chesebrough Company, gave them leave to adduce, at the hearing of the appeal, further evidence as to the date when the trade-mark "Vaseline" was first used by their predecessor R. A. Chesebrough, and also for the purpose of shewing that the word "Vaseline" did not indicate petroleum jelly manufactured under any particular process, whether forming the subject of letters patent or otherwise, but indicated solely that the goods to which the word was applied were of the manufacture of R. A. Chesebrough, or his successors the company.

The company then filed further evidence accordingly. The nature of the evidence, and the material facts of the case as presented at the hearing of the appeal, will be found fully stated in the written judgment of Stirling L.J., with which Vaughan Williams L.J. expressed his agreement, Cozens-Hardy L.J., however, differing.

(1) 7 Ch. D. 834.

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Astbury, K.C., and *A. J. Walter*, for the appellants. It has never yet been decided that the name of a patented article can in no case be used as a trade-mark after the patent has expired. That may be so if there is but one name by which the patented article can be described, as was the case in *Linoleum Manufacturing Co.* v. *Nairn*. (1) In the present case "Vaseline" was not the only name by which the article could be called after the expiration of the patent. That name was a "fancy name," and the article could be called, and, indeed, was known by another name, namely, "petroleum jelly." Moreover, the word "Vaseline" was used, and used as a trade-mark, before the grant of the American patent of 1872. It has in fact been used as a trade-mark by the appellants and their predecessor for at least thirty years. And the evidence shews that it has been understood by the trade as designating the article, petroleum jelly, manufactured by the appellants and their predecessor. The article is manufactured by other persons, and is by them called by different names, such as "petroleum jelly." A word can denote an article made by a particular manufacturer though it is also used to describe the article itself: *Singer Manufacturing Co.* v. *James Spence & Co.* (2) The trade-mark will not suffer because the word has acquired a secondary meaning.

The onus is on the respondent, who seeks to have the trade-mark removed, to prove that the word "Vaseline" was not used in England before the date of the Trade Marks Registration Act, 1875: *In re Leonard & Ellis's Trade-mark* ("Valvoline") (3); and that onus he has not discharged.

[STIRLING L.J. referred to *Young* v. *Macrae*. (4)

COZENS-HARDY L.J. referred to *In re Palmer's Trade-mark* ("Braided Fixed Stars"). (5)]

Moulton, K.C., and *E. F. Lever*, for the respondent Pearson. The evidence does not shew that the word "Vaseline" was used as a trade-mark in England prior to the Act of 1875, which is the real point for consideration. The word is not "distinctive" within s. 10 as construed by the authorities.

(1) 7 Ch. D. 834.
(2) (1893) 10 Rep. Pat. Cas. 297.
(3) (1884) 26 Ch. D. 288.
(4) (1862) 9 Jur. (N.S.) 322.
(5) (1883) 24 Ch. D. 504.

Though it designates a substance, it has ceased to be indicative of the article sold by the appellants, and, therefore, they can no longer claim an exclusive right to it: *Powell* v. *Birmingham Vinegar Brewery Co.* (1) From the evidence it is clear that Chesebrough's claim to register this word as an old mark was unfounded, and that there had been no such user before 1875 as to entitle him to registration.

R. J. Parker, for the comptroller.

Astbury, K.C., in reply.

Cur. adv. vult.

March 24. VAUGHAN WILLIAMS L.J. I agree with the judgment which Stirling L.J. is now going to read.

STIRLING L.J. This is an appeal from an order made by Buckley J. directing that the register of trade-marks should be rectified by the removal of a trade-mark consisting of the word "Vaseline." The trade-mark was registered under the Act of 1875 in the year 1877, as an old mark, which had been in use for six years before March 8, 1877. In 1898 one Edward Theodore Pearson applied to register the word "Vasogen," and the comptroller refused to proceed without the consent of the Chesebrough Manufacturing Company, then the owners of the trade-mark "Vaseline." That consent was refused, and the comptroller declined to register the word "Vasogen." From this decision there was an appeal, which was referred to the Court, the Chesebrough Company being respondents on the appeal. On January 31, 1900, the applicant Pearson gave notice of motion for an order to rectify the register by removing therefrom the word "Vaseline." This motion and the appeal came on together. At the hearing the learned judge was of opinion that it was established on the evidence before him that the word "Vaseline" was in 1877 used "as indicating, not the manufacture of a particular firm, but the petroleum jelly as manufactured by a particular process," and that, on the authority of *Linoleum Manufacturing Co.* v. *Nairn* (2) and cases which have followed it, the mark ought to be removed. From this decision the Chesebrough Company have appealed. Upon

(1) [1894] A. C. 8. (2) 7 Ch. D. 834.

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the appeal further evidence has been admitted, and the facts now appear to be as follows: In 1865 Robert Augustus Chesebrough took out patents in England and America for an improvement in refining petroleum and other hydro-carbon oils. This improvement consisted in the filtration of these oils through animal charcoal (sometimes termed "bone-black") or wood charcoal or other filtering material. The specification states that the oils "filtered in this manner will be light in colour, have very little odour, and be suitable according to their density for the purposes either of lubrication or illumination." It also states that "petroleum may be subjected to such filtration either in its crude or natural state or after distillation." But, as I read the specification, distillation at some stage is necessary, and the oils refined by means of the process therein described are products of the distillation. In 1872 the same inventor took out in America a patent for "improvements in products from petroleum." He states in his specification that he has invented a "new and useful product from petroleum," which he has termed "Vaseline," and that "the substance from which 'Vaseline' is made is the residuum of petroleum left after the greater part of the petroleum has been distilled off." The process of making vaseline is described as consisting of "the filtering of the aforesaid petroleum residuum through bone-black, according to the process described" in the American patent of 1865, and the claim is for "the new article of manufacture named by me 'Vaseline' substantially as herein described." This invention was never patented in England. The process is not, in my opinion, covered by the English patent of 1865, which appears to me, as already stated, to apply only to the product of distillation of crude petroleum, while the process of 1872 applies to the residuum left in the still after the process of distillation is completed. It was, therefore, open to any one in England, after the American patent became known there, to manufacture the new article for which that patent was granted in the United States.

In 1874 R. A. Chesebrough took out in England a patent for improvements in treating hydro-carbon oils and products. The specification begins with the following statement of the nature

of the invention: "When petroleum is distilled, either in the ordinary stills used or by the vacuum or superheated retort processes, a quantity of residuum is left back in the still or retort which has not been distilled over. This residuum contains no paraffin, but appears to be a concentrated product of the heavier parts of petroleum, and from it a material, which I term 'Vaseline,' is made by filtration through bone-black or animal charcoal." The invention is stated to consist in so refining the vaseline as to make it substantially free from the taste, odour, and colour of petroleum, and the specification recognises that in England the patentee has no monopoly in the manufacture of vaseline which is not so refined. There is evidence of the sale in England by the agents of R. A. Chesebrough of vaseline manufactured by him in 1873, 1875, and 1877. Evidence has been given by R. A. Chesebrough and his brother, W. H. Chesebrough (his agent in England), that since 1876 vaseline has been sold in England in tin cans on which is stamped an inscription beginning with the words, "Vaseline trade-mark." It is established that since 1873 the substance termed "Vaseline" in the patent of 1872 has been manufactured in England by many persons, and sold or described under various designations, such as petroleum jelly, unguentum petrolei, and several fancy names, but not under the designation "Vaseline." There is abundant evidence that the name "Vaseline" has always been understood in England to denote the manufacture of R. A. Chesebrough and his successors, the Chesebrough Company. In 1877 the word "Vaseline" was registered in England in four classes, one being Class 3. The *Trade Marks Journal* describes the application in that class as being in respect of "ointments, cerates, cold creams, and vaseline (being an essence prepared for use in medicine and pharmacy)." In 1878 R. A. Chesebrough registered as a trade-mark in America a label beginning, "Petroleum vaseline jelly," and ending, "Prepared expressly for medicinal and toilet purposes by the Chesebrough Manufacturing Company, Office, 110, Fleet Street, New York." By the statement filed in the United States Patent Office, on the occasion of registration (which was verified by affidavit), it is stated as follows: "Said

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trade-mark consists of the word 'Vaseline.' This word has been generally arranged between the words 'petroleum jelly' as shewn in the accompanying facsimile (meaning the label), ... but the words 'petroleum jelly' and the corporate name and address may be wholly omitted, and the border may be changed at pleasure, or omitted altogether, without materially changing the character of said trade-mark, the essential feature of which is the arbitrarily-selected word—Vaseline. This trade-mark has been used in the business of said company and by R. A. Chesebrough, who was its predecessor in the same business, for more than seven years past . . . . Said company has been accustomed to print it upon labels, to be pasted or otherwise secured upon the bottles containing the product or the compound thereof, and upon the paper wrappers in which they put it for sale. It has also been accustomed to emboss it upon the bottles or packages in which the product or compound is inclosed, or, where the compound is of sufficient consistence, to form it directly upon the cakes or tablets thereof. It has also been accustomed to use it upon the bill-heads, letter-heads, envelopes, circulars, and other advertising devices employed in the business."

The question is whether, in these circumstances, the Court ought to come to the conclusion that the word "Vaseline" was, at the date of registration, improperly placed on the register as an old trade-mark under the Act of 1875. It was admitted by the learned counsel for the appellants that the evidence did not establish that the word "Vaseline" was used in England as a trade-mark before August 13, 1875, the date of the passing of the Act of 1875. It was contended, however, that the burden of establishing this did not lie on the appellants, but that it was the duty of the respondent, the applicant for the removal of the trade-mark from the register, to satisfy the Court that it was in fact not so used. In my opinion this contention is well founded. The law was so laid down by the Court of Appeal, consisting of the Earl of Selborne L.C. and Cotton and Fry L.JJ., in *In re Leonard & Ellis's Trade-mark* (1), and was acted on by Kay J. in *In re Edgington's Trade-mark*. (2) In my

(1) 26 Ch. D. 288. (2) (1889) 6 Rep. Pat. Cas. 513.

judgment, this rule ought to be firmly adhered to. It is manifestly unreasonable to expect that the owners of a registered trade-mark should preserve evidence of the way in which it was used at and prior to the time of registration for a long period, in this case of more than twenty years subsequent to registration.

On the part of the respondent reliance was chiefly placed on the American patent of 1872, the English patent of 1874, and the use of the word "Vaseline" in the *Trade Marks Journal* of 1877, upon the occasion of the application for the registration of the mark in England; and it was said that these documents proved that the word "Vaseline" was in use at the date of registration to indicate, not an article manufactured by the Chesebrough Company, but one manufactured according to the processes indicated in the American and English patents. If this were the true conclusion of fact, then there would arise a question which was raised in the case of *In re Leonard and Ellis's Trade-mark* (1), but remains undecided—namely, whether, when an inventor invents a new article, and at the same time invents a word to designate it, he can claim the exclusive use of that word to denote his own manufacture. In my opinion, however, it is unnecessary now to decide that question. The word "Vaseline" was admittedly invented by R. A. Chesebrough, and, in my opinion, was capable, previously to 1875, of being employed by him to denote an article of his manufacture. On this I may refer to what was said by Wood V.-C. with reference to the word "paraffin" in *Young* v. *Macrae* (2), *Browne* v. *Freeman* (3), and *Braham* v. *Bustard*. (4) The language both of the American patent of 1872, in which he uses the words "which I have named Vaseline," and the English patent of 1874, in which he uses the words "which I term Vaseline," appears to me to be ambiguous; the meaning may be either that the name was given to the substance manufactured by R. A. Chesebrough and his successors, the company, or that it was used to designate the substance made according to the process described. If this be so, it seems to

(1) 26 Ch. D. 288.
(2) 9 Jur. (N.S.) 322.
(3) (1864) 12 W. R. 305.
(4) (1863) 1 H. & M. 447, 454.

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me the onus of proof which lies on the respondent is not discharged. As regards the entry in the *Trade Marks Journal* of 1877, I think that the word "Vaseline" ought there to be read in the same sense throughout, and to be regarded as denoting the goods manufactured by the Chesebrough Company.

Another objection to the registration was taken. It is well settled that a word could be properly registered as an old trade-mark under the Act of 1875, only if it had been used alone as the trade-mark before August 13, 1875, and was not properly registered if it had been merely used in combination with other words: see *Perry Davis & Son* v. *Hærbord* (1); *Powell* v. *Birmingham Vinegar Brewery Co.* (2) It was contended that the documents relating to the registration in America shewed that the user had been in connection with other words, and they do appear to shew that such had been the general user; but the statement filed in the United States Patent Office, from which I have quoted, indicates that the actual user was not entirely limited in this way. According to the evidence, there was a user of the word "Vaseline" in England as a trade-mark in 1876, and here again the respondent appears to me to have failed to shew that the word "Vaseline" was not in use by itself as a trade-mark in England previously to August 13, 1875. I also think that *Linoleum Manufacturing Co.* v. *Nairn* (3) is distinguishable from the present case. It simply decides that "where the inventor of a new substance gives it a name, and, having taken out a patent for the invention, has, during the continuance of the patent, alone made and sold the substance by that name, he is not entitled to the exclusive use of that name after the expiration of the patent." Here no patent was taken out in England for the substance which (when manufactured by himself) the inventor named "Vaseline." The inventor never at any time was alone the manufacturer and vendor of that substance in England. The substance invented by him was never in England known solely by the name of "Vaseline"; on the contrary, it was

(1) (1890) 15 App. Cas. 316. (2) [1894] A. C. 8.
(3) 7 Ch. D. 834.

known under many names, and the evidence is that the name "Vaseline" has in England always been confined to the inventor's manufacture.

In my judgment the appeal should be allowed, and an order made refusing the application to rectify the register. But I think the order as to costs made in the Court below ought not to be disturbed, and that there ought to be no costs of the appeal, except that the respondent, Mr. Pearson, must pay the costs of the comptroller.

COZENS-HARDY L.J. This is an appeal from an order of Buckley J., by which he has removed from the register of trade-marks the word "Vaseline." This trade-mark was registered by Mr. R. A. Chesebrough of New York, in several classes, in the year 1877, as an old mark which had been used for six years before March 8, 1877. Under the Act of 1875 the word could not be registered unless it had been used as a trade-mark before the passing of the Act.

The applicant, Mr. Pearson, who is a "person aggrieved," and who has admittedly a locus standi, applied to strike out the mark, on the ground that it ought never to have been placed upon the register. Having regard to the fact that "Vaseline" has been on the register for nearly a quarter of a century, I feel that the burden of proof rests strongly upon any one who seeks to disturb such a long-standing position. If Mr. Chesebrough had been content to file no evidence, I think he might well have said that no case had been made out; but as evidence has been gone into on both sides, and as the most material evidence against the mark is furnished by the respondent, I think we are bound to consider the matter as a whole, and to arrive at the best conclusion we can.

Before considering the evidence in detail, I think it right to point out the extremely unsatisfactory nature of the respondent's evidence. Indeed, this was so manifest that application was made to the Court to admit further evidence on the appeal. Now, although in the present case such further evidence has been admitted, it is obvious that evidence directly addressed to cure blots pointed out by the learned judge at the original

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hearing should be carefully scrutinised, more especially when there has been no opportunity of cross-examination.

In 1865 Robert A. Chesebrough took out a patent in England, and a similar patent in America, for improvements in refining petroleum or other hydro-carbon oils. The patent does not mention "Vaseline," and although in the evidence before Buckley J. it was sworn by Mr. W. H. Chesebrough that the word "Vaseline" was invented by Mr. R. A. Chesebrough in 1871, and applied to articles made under the patent of 1865, I think, according to the true construction of the patent, this cannot be so. The patent process stopped short of the stage at which "Vaseline" is produced.

In 1873 Mr. R. A. Chesebrough took out an American patent by which he claimed "the new article of manufacture named by me 'Vaseline' substantially as herein described." In the body of the patent he calls it "a distinct substance by itself," and "a new article of manufacture." He describes it as made in a particular mode from the residuum of petroleum left in the still after distillation. This invention was never patented in England, but in 1874 Mr. R. A. Chesebrough obtained an English patent by which he claimed as his invention (inter alia) "the manufacture of the material I term 'Vaseline' from the residuum of petroleum by simmering in open kettles, and filtration through bone-black as hereinbefore described." In short, this was a patent for producing the same article, vaseline, by a new process.

In 1877 Mr. Chesebrough registered "Vaseline" in four classes. He described himself as a manufacturer of "Vaseline," and in the column headed "Description of goods" he entered "Vaseline used for stuffing and currying of leather." There is evidence of a sale of vaseline in England in 1873. This was vaseline made under the American patent, and imported by the American patentee into this country. I can find no evidence that the word "Vaseline" was used in England as a trade-mark before August 13, 1875. There is a large amount of trade evidence to the effect that the word "Vaseline" has been regarded as denoting the goods of the Chesebrough Company, but I attach no weight to this evidence. The fact that

"Vaseline" has been registered since 1877 has made it de facto the Chesebrough trade-mark. The real question for decision is whether it could be or was used as a trade-mark before 1875, and not whether it has since been so used. I regret that I am not able to concur in the judgment which has just been delivered by Stirling L.J. I have reluctantly come to the conclusion that it appears, from the respondent's own evidence, that the word "Vaseline" was an invented word to describe an invented thing; and, if so, I think it follows that any one was at liberty to make the invented article, which was not protected by patent in England, and at liberty to call it by the name attributed to it by the inventor.

In the case of *Linoleum Manufacturing Co.* v. *Nairn* (1) Fry J. applied this principle to the case of a patented article after the expiration of the patent; but I think it cannot be limited to that case. I adopt the language of that learned judge (when Lord Justice) in the "Valvoline" case, *In re Leonard & Ellis's Trade-mark* (2), where he said: "When a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker. I am inclined to think that the words 'special and distinctive' import the specializing of the make and manufacture of a particular maker from all other manufacturers, and distinguishing the manufacture of one person from the manufacture of all others." Any other view seems to me inconsistent with the essential idea of a trade-mark. It is no doubt true that petroleum jelly, which may or may not have been substantially the same in its chemical constituents as vaseline, has been sold in this country under various other names. But I am not satisfied that this was done before 1875, and, even if it had been done before 1875, I do not think it would have helped Mr. Chesebrough, who described himself as carrying on the business of a manufacturer of vaseline. It

(1) 7 Ch. D. 834. (2) 26 Ch. D. 288, 304.

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follows that, in my opinion, it is established that "Vaseline" was not and could not be an old mark in 1875. I may add, though I do not base my judgment upon this, that I have grave doubt whether before 1875 it was ever used alone as a trade-mark, even in America, still less in this country.

For these reasons I think the judgment of Buckley J. was correct, and that the appeal ought to be dismissed.

Solicitors: *J. H. & J. Y. Johnson; Burn & Berridge; The Solicitor to the Board of Trade.*

G. I. F. C.

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BELLERBY *v.* ROWLAND & MARWOOD'S STEAMSHIP COMPANY, LIMITED.

[1900 B. 4759.]

Limited Company—Surrender of Shares—Invalidity—Release of Shareholder's Liability—Rectification of Register—Discretion of Court—Lapse of Time—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 35; *Sched. I., Table A, clauses* 20, 21.

A surrender of shares in a limited company, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company, and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409.

A surrender of shares which has the effect of reducing the company's capital can be supported only under circumstances which would have justified a forfeiture of the shares, the validity of forfeiture being recognised by s. 26 of the Companies Act, 1862, and by Table A to that Act, clauses 20, 21.

Per Stirling L.J.: *Teasdale's Case*, (1873) L. R. 9 Ch. 54, ought not to have been followed in *Eichbaum* v. *City of Chicago Grain Elevators*, [1891] 3 Ch. 459, inasmuch as the circumstances of the two cases differed in a material point.

Semble, that *Teasdale's Case* has been overruled by *Trevor* v. *Whitworth*.

Per Cozens-Hardy L.J.: A surrender of fully paid shares is unlawful, except under circumstances which would justify a forfeiture.

A surrender of shares which is illegal and null and void having been made, the Court will, in an action by the surrenderor against the company, order the plaintiff's name to be restored to the company's register in respect of the surrendered shares, even after the lapse of years, the shares

not having been meanwhile reissued or otherwise dealt with by the company.

Decision of Kekewich J., [1901] 2 Ch. 265, on the former point affirmed, and on the latter point reversed.

APPEAL from the decision of Kekewich J. (1)

The above company was incorporated in May, 1890, with a capital of 275,000*l.*, divided into 25,000 shares of 11*l.* each. The objects of the company were, shortly, to acquire steamships and vessels of every description, and to carry on the business of shipowners.

By clause 37 of the articles of association, "The directors may accept from any member, on such terms and conditions as shall be agreed, the surrender of his shares, or stock, or any part thereof."

In 1893 the plaintiffs, Bellerby, Moss, and Marwood, were, with William Wright and John Rowland (both since deceased), the directors of the company. Bellerby, Moss, and Marwood were at the date of the action still three of the directors. In 1893 a steamship called the *Golden Cross*, belonging to the company, was, owing to the depressed condition of the shipping trade, sold at a loss of over 4000*l.* The directors agreed to bear that loss between them, and, with the object of relieving the company from the loss, it was arranged that each of the directors should surrender to the company eighty-three of his shares in the company. At this time 10*l.* per share had been paid up, 1*l.* per share remaining uncalled. By resolutions of the board of June 29 and 30, 1893, the transaction was confirmed, and the certificates for the shares surrendered were cancelled, new certificates being issued to the directors for the balances of their respective holdings. In July, 1893, the directors executed a deed-poll, by which they declared that they had respectively surrendered the shares identified by the numbers on the register, and all their interest therein respectively, "the object of such surrender being to make good to the said company all losses sustained by it in relation to the steamship *Golden Cross*, recently sold by us as such directors

(1) [1901] 2 Ch. 265.

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as aforesaid to the International Line Steamship Company. But (without prejudice nevertheless to the validity of such surrender) we hereby expressly declare that we do not, nor does any one of us, admit, that we or any of us are or is under any obligation whatsoever to make good such losses or any part thereof."

The intention of the directors was that the shares should become vested in the company, and that the directors should not remain liable for the 1*l.* per share at that time unpaid. Since 1893 the business of the company had become more prosperous, and at general meetings of the shareholders, held on September 20, 1899, and September 19, 1900, the view was expressed that the prosperity of the company warranted the restoration of their shares to the former directors and the representatives of the two who had died, and, as the result of a further meeting of the shareholders held on October 10, 1900, this action was brought against the company by the three surviving directors and the executors of the two who had died, claiming (1.) a declaration that the surrender or purported surrender of the shares, and the acceptance thereof by the company, was ultra vires of the company and inoperative; (2.) to have the deed-poll of July, 1893, set aside and cancelled; (3.) payment of all dividends payable in respect of the shares since June, 1893; and (4.) that the register of members of the company might be rectified by inserting the names of the several plaintiffs as shareholders in respect of the shares surrendered by them or their testators respectively with the sum of 10*l.* paid up on each share. The claim (3.) for back dividends was afterwards abandoned.

The surrendered shares had not been reissued or in any way dealt with by the company.

Kekewich J. held that the surrender was illegal and null and void, but he dismissed the action on the ground that it was in substance an application under s. 35 of the Companies Act, 1862, for the rectification of the company's register, and that after the lapse of time the plaintiffs had no equity to justify the interference of the Court.

The plaintiffs appealed.

Upjohn, K.C., and *Eustace Smith*, for the plaintiffs. The surrender of the shares was ipso facto void, as indeed Kekewich J. held, and for the reason assigned by him, as being in effect a purchase of the shares by the company, the consideration being the release of the surrenderors from the liability to pay the 1*l.* per share remaining uncalled: *Trevor* v. *Whitworth*. (1) That being so, the shareholders have a legal right to have their names restored to the register, and the Court will enforce that legal right, there being no equity even alleged to the contrary. It is the duty of the company to keep their register properly: Companies Act, 1862, s. 25. In the Scottish case, *General Property Investment Co.* v. *Matheson's Trustees* (2), a very similar case to the present, the Court granted relief such as is asked here.

[COLLINS M.R. In that case the application to restore the shareholder to the list was made by the liquidator of the company.]

If the Court has a discretion under s. 35 of the Companies Act, 1862, and as to granting a mandamus, it is a judicial discretion. On the day after the surrender of the shares the directors had a legal right to have their names restored to the register, and nothing has since happened to take away that right. No legal ground of defence to the action has been shewn. In *Trevor* v. *Whitworth* (3) Lord Macnaghten said that the decision of the Court of Appeal in *In re Dronfield Silkstone Coal Co.* (4) might be supported on the ground of discretion, though he thought that the reasoning on which it was founded was wrong. By this surrender the capital of the company was in effect reduced, and the safeguards prescribed by the Companies Acts, 1867 and 1877, before reduction of capital can be confirmed by the Court, were evaded. No one can be estopped from insisting on the invalidity of a void transaction: *Chapleo* v. *Brunswick Permanent Building Society* (5); *Ex parte Watson* (6); *Great North-West Central Ry. Co.* v. *Charlebois*. (7)

(1) 12 App. Cas. 409.
(2) (1888) 16 R. 282.
(3) 12 App. Cas. 439, 440.
(4) (1880) 17 Ch. D. 76.
(5) (1881) 6 Q. B. D. 696.
(6) (1888) 21 Q. B. D. 301.
(7) [1899] A. C. 114.

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The plaintiffs had a choice of three remedies, namely, (1.) an action, such as that which they have brought; (2.) an application for a mandamus; (3.) an application under s. 35 of the Companies Act, 1862, for rectification of the register. With regard to the discretion of the Court in granting a mandamus: see Shortt on Mandamus, pp. 223 et seq. The decision in *In re Dronfield Silkstone Coal Co.* (1) was really based on the particular facts of that case, and on the statutory limitation of the jurisdiction conferred by s. 35 of the Companies Act, 1862. That section provides a summary procedure for obtaining rectification of the register of members, but it does not take away the remedy by action.

[COZENS-HARDY L.J. In the *Dronfield Case* (1) the shareholder applied to be taken off the list of contributories on which he had been placed by the liquidator.]

In *Sichell's Case* (2), Lord Cairns L.J. exercised the discretion conferred by s. 35 in refusing an application to rectify the register of a company which was made by the liquidator after the winding-up order, the ground of the refusal being the default of the company before the winding-up.

Warrington, K.C., and *H. E. Wright*, for the defendants. It is submitted (1.) that the surrender was valid, and that by virtue of it the directors ceased to be shareholders as regarded the surrendered shares, and have no right to be replaced on the register; (2.) that, even if the plaintiffs are entitled still to be regarded as shareholders in respect of these shares, Kekewich J. was under the circumstances right in refusing to restore their names to the register.

As to (1.) the transaction of 1893 was not a purchase of the shares; it was a surrender, and was valid notwithstanding *Trevor* v. *Whitworth*. (3) Here there was not, as in that case, an application of the money of the company in purchasing the shares. There are decisions which shew that a simple surrender of shares is perfectly valid. A surrender does not amount to a "reduction" of the capital of the company in the sense in which that term is used in the Companies Acts, 1867

(1) 17 Ch. D. 76. (2) (1867) L. R. 3 Ch. 119.
(3) 12 App. Cas. 409.

and 1877; it was not a permanent reduction, for the shares could be reissued: *In re Denver Hotel Co.* (1) It is clear from the decisions that some surrenders of shares are valid, and the question whether any particular surrender is or is not valid must depend on the facts of the case. It is submitted that a surrender of partly paid shares may be valid, and that no surrender is invalid unless it involves a purchase of the shares with the company's money: Lindley on Companies, 5th ed. pp. 517 et seq.; *Marshall* v. *Glamorgan Iron and Coal Co.* (2); *Wright's Case* (3); *Teasdale's Case* (4); *Snell's Case.* (5) That the decision in *Teasdale's Case* (4) has not been impeached is shewn by *Eichbaum* v. *City of Chicago Grain Elevators* (6), where it was followed by Stirling J., though a dictum of James L.J. has been disapproved. The ground of the judgment, so far as regards the surrender of shares, remains untouched.

[COZENS-HARDY L.J. In *Teasdale's Case* (4) the resolutions were passed before the Companies Act, 1867.]

After a surrender the share still exists, and it is capable of being reissued, unless it is treated as permanently extinguished: *In re Denver Hotel Co.* (1) The person who surrenders ceases to be a shareholder, but no one takes his place, unless the share is reissued. The share is not the property of the company; it is like a share which has never been issued, except that money has been paid to the company in respect of it. A share is only a right to receive a certain proportion of the profits of the company. One result of a surrender is that, in the event of a winding-up of the company, the surplus assets would be divided among a smaller number of persons. In the same way, while the company is going on the profits would be divisible among a smaller number of persons. The company itself would gain no advantage by the surrender, but the individual shareholders would.

By clause 20 of Table A, Sched. I., to the Companies Act, 1862, a forfeited share may be disposed of in such manner as

(1) [1893] 1 Ch. 495, 505.
(2) (1868) L. R. 7 Eq. 129.
(3) (1871) L. R. 12 Eq. 331, 336.
(4) L. R. 9 Ch. 54.
(5) (1869) L. R. 5 Ch. 22.
(6) [1891] 3 Ch. 459.

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the company thinks fit, and clause 22 implies that it may be reissued to a purchaser, and in reallotting a forfeited share which has been partly paid up the company can give credit for the money already paid on the share: *Morrison* v. *Trustees, Executors and Securities Insurance Corporation.* (1) The new holder would be liable to calls as a shareholder. The reissue is in substance a reallotment of the share. A surrender is not precisely the same thing as a forfeiture; the shareholder gives up his rights against the joint stock, and the company gives up its right against him in respect of the amount uncalled upon the shares. The object of the surrender in the present case was, not to get rid of the shareholders' liability, but to make good to the other shareholders the loss which had been incurred, so that the profits might be divided among a smaller number of shareholders. The amount of the issued capital was not affected; only the liability of the surrendering shareholders was extinguished. The judgments of the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (2) shew that the Court has power to sanction the reduction of the capital of a company by means of a purchase of the shares of individual shareholders.

There was nothing in the present case which bound the company to accept the surrender in satisfaction of any liability of the directors in respect of the loss upon the ship. In accepting the surrender the company gave up nothing except that which resulted from the surrender itself.

[COLLINS M.R. referred to *Price* v. *Jenkins* (3), in which it was held that a settlement of leasehold property was not a voluntary conveyance, because the liability of the trustees in respect of the rent and the lessee's covenants was a valuable consideration for the assignment to them.]

As to the second point, s. 35 of the Companies Act, 1862, provides a summary procedure for the rectification of the register, and primâ facie any application by a shareholder with reference to the register must be deemed to be made under that section, even if it is not made in a summary manner,

(1) (1898) 68 L. J. (Ch.) 11. (2) [1894] A. C. 399, 414.
(3) (1877) 5 Ch. D. 619.

but, e.g., by an action, as here. The words of s. 35, "may, if satisfied of the justice of the case, make an order for the rectification of the register," apply to an action equally with a summary motion. It is submitted that Kekewich J. was right in holding that "the justice of the case" did not require that the plaintiffs should be placed upon the register. The directors voluntarily altered the register with a view to the benefit of the company, and it is not open to them to come now and ask to have their names replaced as they were before the surrender, because they wish to share in the present prosperity of the company.

If the transaction of surrender was ultra vires, the circumstances can make no difference. If the transaction was intra vires, all the circumstances must be considered.

Upjohn, K.C., in reply. A shareholder can get rid of his liability on his shares in one of four ways: (1.) by payment at the proper time of the amount uncalled on the shares; (2.) by transfer to another person and the expiration of twelve months after the transfer which is necessary to relieve him from any liability as a past member; (3.) by a bonâ fide forfeiture; (4.) by means of a reduction of the company's capital under the Companies Acts, 1867 and 1877. When (2.) is adopted, another person becomes liable upon the shares in place of the transferor. By means of (3.) the company can get rid of an insolvent shareholder whose liability is of no value. In the present case, if the transaction was valid and was carried out accordingly, the liability of the shareholder to pay capital to the company would be extinguished. The amount released to the shareholder was permanently withdrawn from the company's trading capital. The uncalled capital of the company was an "available asset": *In re Denver Hotel Co.* (1) It might perhaps have been a different matter if the shares had been reissued.

As to the other point, the Court will give effect to a legal right.

Cur. adv. vult.

(1) [1893] 1 Ch. 495.

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May 6. COLLINS M.R. read his judgment as follows:—The facts are sufficiently stated in the report (1), and I need not repeat them. Since *Trevor* v. *Whitworth* (2) it is clear law that a limited company incorporated under the Joint Stock Companies Acts cannot purchase its own shares, unless it does so by way of reduction of capital with the sanction of the Court under the provisions of the Companies Acts, 1867 and 1877: see *British and American Trustee and Finance Corporation* v. *Couper*. (3) Cases dealing with the acquisition by companies of their own shares before *Trevor* v. *Whitworth* (2) was decided are now of little assistance. Is then the transaction in this case a purchase by the company of its own shares? It was certainly intended by the parties who carried it out to involve the release by the company to the surrenderors of the right to call up the unpaid balance of 1*l.* on each share, and was, therefore, not a gratuitous surrender. There was an exchange of real consideration between the parties, and, therefore, it ought to be described perhaps more accurately as a sale and purchase than as a surrender. But, assuming that it can be properly described as a surrender, although it involves a consideration given out of the assets of the company to the party surrendering, it remains to consider whether there is any legal ground upon which it can be taken out of the principle of *Trevor* v. *Whitworth*. (2) It seems to me that there is not. An argument was addressed to us by Mr. Warrington based on a minute criticism of some passages in the speeches of the learned Lords, in which they deal with the argument that to hold a sale bad would be to forbid forfeitures and surrenders, and point out that these differ from the case actually before them, which involved a present parting by the company with the amount actually paid up on the shares. But, whether this distinction is conclusive or not, it seems to me that when closely criticised these dicta as to surrenders deal with them as a species of forfeiture, which, as the learned Lords point out, is recognised by the Act itself, and cannot be extended to cover a transaction

(1) [1901] 2 Ch. 265. (2) 12 App. Cas. 409.
(3) [1894] A. C. 399.

having none of the elements of a forfeiture. Lord Herschell said (1): "It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which, in the absence of other provisions, regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield Silkstone Coal Co.* (2): 'It is not for me to say what the limits of surrender are which are allowable by the Act . . . . because each case as it arises must be decided on its own merits.'" Lord Watson said (3): "Notwithstanding the general prohibition of alterations upon the memorandum of association which diminish the capital, whether paid-up or nominal, of a company limited by shares, the Companies Acts contemplate the possibility of diminution of unpaid capital in certain cases, although the memorandum remains unaltered. Sect. 26 of the Act of 1862 and the regulations of Table A (17 to 22) shew plainly that the Legislature intended companies to have the power of forfeiting shares. There is no reference in the Acts to surrenders of shares; but these have been admitted by the Courts upon the principle, as I understand it, that they have practically the same effect as forfeiture, the main difference being that the one is a proceeding in invitum, and the other a proceeding taken with the assent of the shareholder, who is

(1) 12 App. Cas. 417. (2) 17 Ch. D. 85. (3) 12 App. Cas. 429.

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unable to retain and pay future calls on his shares." Again, Lord Macnaghten said (1): "Now the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power 'to pay off any capital which may be in excess of the wants of the company,' and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or 'the payment to any shareholder of any paid-up capital.' It follows that if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

"One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in s. 26; every company is to return to the Registrar of Joint Stock Companies once a year 'the total amount of shares forfeited.' There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction." And again, in *British and American Trustee and Finance Corporation* v. *Couper* (2), Lord Macnaghten said: "Speaking for

(1) 12 App. Cas. 438. (2) [1894] A. C. 414.

myself, I cannot see any substantial distinction between the *Denver Hotel Case* (1), where the reduction was confirmed, and the present case, where it is admitted that, if the view of the Court of Appeal in the *Denver Hotel Case* (1) be correct, confirmation must be refused. In both cases, as it seems to me, you have a purchase by a limited company of its own shares; for I cannot agree that a transaction which involves a surrender of shares as part of the consideration is anything but a purchase of shares within the meaning of the opinion of this House in *Trevor* v. *Whitworth*." (2)

I can see no distinction in principle between returning to a shareholder a part of the paid-up capital in exchange for his shares and wiping out his liability for the uncalled-up sum payable thereon. Both methods involve a reduction of the capital which, as Lord Watson pointed out in *Trevor* v. *Whitworth* (3), persons dealing with the company are entitled to rely upon as existing, either as paid up or as still to be called up, and such a reduction, therefore, can only hold good if sanctioned under the conditions prescribed. If it be objected that the shares may, in the language of Lord Watson, be "reissued," and that though the liability of the surrenderor to pay the amount still uncalled is extinguished, the liability will remain good against any one to whom the company disposes of the share, the answer in this case is the same as that suggested by Lord Watson in the case where the money paid up on the share is returned to the shareholder. He said (4): "In the event of the company continuing to hold the shares (as in the present case) the amount paid up is permanently withdrawn from its trading capital."

But further and apart from the question of sale or trafficking in a company's own shares, I think the reasoning in *Ooregum Gold Mining Company of India* v. *Roper* (5) establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his shares is an ultra vires act on the part of the company. "It seems to me," said Lord Halsbury L.C. (6),

(1) [1893] 1 Ch. 495.
(2) 12 App. Cas. 409.
(3) Ibid. 423.
(4) 12 App. Cas. 424.
(5) [1892] A. C. 125.
(6) Ibid. 133.

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"that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing. I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security"; and the opinions of the other learned Lords are to the same effect. The justification of forfeitures rests upon the statute itself, and I think that since *Trevor* v. *Whitworth* (1) no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture. It is not necessary to refer to *Eichbaum* v. *City of Chicago Grain Elevators* (2), decided by my brother Stirling on the authority of *Teasdale's Case* (3), as he will deal with those cases himself. In *In re Denver Hotel Co.* (4) Lindley L.J., in supporting a surrender, relied on the fact, pressed by counsel in argument, that, "the shares being fully paid up, their surrender involves no release by the company of any of its rights against the surrenderor," indicating thereby the possible importance of a release. It is not, however, necessary to consider in this case whether a surrender, even of fully paid-up shares, could be supported. I am of opinion, therefore, that Kekewich J. was right in his decision on the principal question in the case.

Upon the second point, however, he has held that, notwithstanding that the surrender of the shares was void as being an act ultra vires, still the application to restore the plaintiffs to the register must be treated as being made under s. 35 of the Act of 1862, and that he was not satisfied of the justice of the

(1) 12 App. Cas. 409.
(2) [1891] 3 Ch. 459.
(3) L. R. 9 Ch. 54.
(4) [1893] 1 Ch. 495, 505.

case within that section, and he therefore refused to make the order. The learned judge relied on the fact that so much time had elapsed since the surrender, and that it was conceivable that some persons might have altered their position on the footing that the capital of the company had been reduced, and, relying upon *Sichell's Case* (1) and the dicta of Lord Macnaghten in *Trevor* v. *Whitworth* (2), he held that the plaintiffs had shewn no equity in their favour to disturb the existing state of things, and he therefore refused to rectify the register at their instance. The application in this case is not in fact made under s. 35 (if anything turns upon that), but is an action, asserting the legal right of the plaintiffs to be on the register, on the ground that the act whereby they were removed from it was ultra vires, and, therefore, a nullity. *Sichell's Case* (1) did not relate to an act ultra vires of the company, and in Lord Macnaghten's observations in *Trevor* v. *Whitworth* (2) on *In re Dronfield Silkstone Coal Co.* (3) he treated the application as made by one who had no equity to set the Court in motion. Here it seems to me that in point of law the plaintiffs never ceased to be the legal owners of the shares, and therefore they are not obliged to rely upon an equity to have the register rectified. Nor, on the other hand, can the company set up lapse of time or acquiescence as validating that which was in its essence incapable of being made valid, being, as Jessel M.R. pointed out in the *Dronfield Case* (3), void and not voidable only. The Scottish case, *General Property Investment Company* v. *Matheson's Trustees* (4), is an authority directly in point on this part of the case, unless the fact of liquidation makes a difference. An action was there brought by the liquidator to place on the register a shareholder who had sold his shares to the company at their instance many years before, and Lord Shand, in dealing with an argument based on s. 35, said (5): "If the legal right of the company be clear, then it follows that the justice of the case requires that effect shall be given to that right." It seems to me, therefore, that

(1) L. R. 3 Ch. 119.
(2) 12 App. Cas. 409.
(3) 17 Ch. D. 76.
(4) 16 R. 282.
(5) 16 R. 291.

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the learned judge's decision on this part of the case cannot be supported, and that the appeal must be allowed.

STIRLING L.J. read the following judgment:—On the first of the two points decided by Kekewich J., I have arrived at the same conclusion as the learned judge, though not without some doubt.

I take the effect of the transaction (as contemplated by the parties) to have been, that the shares surrendered were to become the property of the company, who would have power to deal with them in any manner permitted by law, but were not to enforce payment of the 1*l.* per share remaining unpaid against the surrenderors. The company might, for example, sell the shares to a purchaser, subject to the liability to pay 1*l.* per share, as and when called up, but could not extinguish the shares, except under the provisions of the Companies Acts with respect to reduction of capital.

Now, Table A in Sched. I. to the Companies Act, 1862, contains the following provisions:—

"(20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit.

"(21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture."

Forfeited shares, therefore, may become the property of the company, and may be disposed of by the company in any manner permitted by law. Again, as the rights of the company in respect of calls due at the time of forfeiture are expressly preserved, it follows, in my opinion, that the company could not resort to the member whose shares have been forfeited for subsequent calls. Forfeited shares, therefore, under Table A stand in a similar position to that in which the surrendered shares in the present case were intended to be; and it seemed to me that the clauses of Table A to which reference has been made might possibly be regarded as shewing that the Legislature did not consider the existence of such a state of things as constituting a reduction of capital contrary to the provisions

of the Companies Acts, or as otherwise violating any of the enactments therein contained. But, upon a careful examination of what was laid down in *Trevor* v. *Whitworth* (1), *Ooregum Gold Mining Company of India* v. *Roper* (2), and *British and American Trustee and Finance Corporation* v. *Couper* (3), I think the weight of authority is in favour of the view that forfeiture, which is specifically mentioned in the Act of 1862, stands on a special footing, and that surrenders can only be supported in circumstances which would justify forfeiture.

I wish to add a few remarks with reference to *Eichbaum* v. *City of Chicago Grain Elevators* (4), which was cited in argument. That case was decided by me on the authority of *Teasdale's Case* (5), which appeared to me to be precisely in point. There is, however, a difference, which was pointed out by Cozens-Hardy L.J. (so far as I know for the first time) during the argument of the present case, namely, that the resolutions for the surrender of the shares in *Teasdale's Case* (5) were passed in 1865, before the passing of the Companies Act, 1867, while the resolutions in *Eichbaum's Case* (4) were brought forward in 1891, after the passing of that statute. I now think that in these circumstances I ought not to have followed *Teasdale's Case* (5), and further, that, although there was in 1891 some ground for the view that the last-mentioned case was not overruled by *Trevor* v. *Whitworth* (1) (see Lindley on Companies, 5th ed. p. 526), it seems now, in face of the later decisions, much more difficult to support that view.

On the second point, I think that the decision of Kekewich J. cannot be sustained. The learned judge appears to have relied mainly on what was said by Lord Macnaghten in *Trevor* v. *Whitworth* (1) with reference to *In re Dronfield Silkstone Coal Co.* (6) In that case the surrender was merely part of a larger transaction, which, in the language of Lord Macnaghten (7), "could not be undone altogether so as to restore the parties to

(1) 12 App. Cas. 409.
(2) [1892] A. C. 125.
(3) [1894] A. C. 399.
(4) [1891] 3 Ch. 459.
(5) L. R. 9 Ch. 54.
(6) 17 Ch. D. 76.
(7) 12 App. Cas. 440.

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their original position, and which could not be undone at all without committing injustice." Here there is no such difficulty. The surrender is an isolated transaction, and it is neither alleged nor proved that any one has altered his position by reason of it. It is true that in past years dividends may have been paid to the shareholders of the company at a somewhat higher rate than would otherwise have been the case, by reason of no one participating in respect of the surrendered shares; but any difficulty which might thus be caused is precluded by the withdrawal of all claim on the part of the plaintiffs to past dividends. I think, therefore, that the appeal should be allowed.

COZENS-HARDY L.J. read the following judgment:—This is an appeal from the judgment of Kekewich J., who has held that a transaction by which the plaintiffs in 1893 surrendered to the defendant company 415 shares of the nominal amount of 11*l.* each, of which only 10*l.* had been paid, was ultra vires and void, but that the plaintiffs are, nevertheless, not entitled now to have their names restored to the register. The transaction seems to have been perfectly honest. A loss of 4000*l.* had been incurred by the company in relation to a ship, and the plaintiffs, who were directors, without admitting any obligation to make good any part of the loss, surrendered the shares upon the terms that they should not remain liable for the 1*l.* per share still unpaid. The transaction was not entered into with a view to escape liability, and, except on the ground of its being ultra vires, there is no reason for impeaching it. The company has since become highly prosperous, and the plaintiffs desire to get back their shares. No claim is made for past dividends. The surrender was effected by a deed-poll, but I think it must be treated as if the company had been parties to a deed by which, in consideration of the surrender of the shares to the company, they released the plaintiffs from all liability in respect of the 1*l.* per share. Since 1893 there has been no attempt by the company to dispose of the 415 shares. In the balance-sheets and returns the subscribed capital has since 1893 been treated as 21,595 shares, with 10*l.* per share called

up, instead of 25,000 shares with 10*l.* per share called up. The nominal capital is 25,000 shares of 11*l.* each.

I assume that the arrangement entered into in 1893 was a highly beneficial arrangement for the company. The question remains, however, whether it was not ultra vires.

I do not propose to discuss the early authorities with reference to the reduction of capital and the surrender of shares. They are neither consistent nor satisfactory. But the House of Lords has in three recent important cases laid down the principles which must govern our decision. They are—*Trevor* v. *Whitworth* (1) in 1887, *Ooregum Gold Mining Co. of India* v. *Roper* (2) in 1892, and *British and American Trustee and Finance Corporation* v. *Couper* (3) in 1894.

Two propositions may be asserted without doubt. First, a company may forfeit shares. This is recognised by s. 26 of the Companies Act, 1862, as well as by Table A. Secondly, it is not competent to a company to purchase its own shares, and any such transaction is ultra vires. I think *Trevor* v. *Whitworth* (1) also decides that, under circumstances which would entitle a company to forfeit shares for non-payment of calls, the same result may be attained by means of a voluntary surrender. In the case of forfeiture the statute treats the forfeited shares as being the property of the company, and it may well be that the acquisition of this property by the company is equally lawful, whether it is acquired by hostile proceedings in the nature of forfeiture, or by a voluntary transaction producing the same result. There is no infringement of the statutory provisions in either case. There is merely an unimportant difference in form. When, however, the transaction involves, as in the present case, the release by the company to the shareholders of uncalled capital on their shares, it seems to me that it is, within *Trevor* v. *Whitworth* (1), a reduction of capital not sanctioned by law.

The decision of the House of Lords in the *Ooregum Case* (2), that shares in a limited company cannot be issued at a discount, involves the principle, that the company cannot by any device

(1) 12 App. Cas. 409. (2) [1892] A. C. 125.
(3) [1894] A. C. 399.

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relieve a shareholder from the liability to pay the full amount due on his shares. This would be the result, if the shares had been retained by the plaintiffs, instead of being surrendered to the company. But the fact that in consideration of the release the shares were surrendered seems to me to render the transaction no better. Uncalled capital is part of the assets of the company. It may be mortgaged: *In re Pyle Works* (1); *Newton* v. *Anglo-Australian Investment, Finance and Land Co.* (2) And, by clause 107 (8.) of the defendant company's articles of association, a mortgage of its uncalled capital is expressly authorized. The company, therefore, parted with 415*l.*, a portion of its assets, in consideration of the acquisition of the shares. This was a purchase of the shares, and is directly within the authority of *Trevor* v. *Whitworth*. (3)

It is not necessary, in my view, for the purpose of the present case to go beyond this. But a careful consideration of the speeches of Lord Macnaghten and Lord Watson in *Trevor* v. *Whitworth* (3) and *British and American Trustee and Finance Corporation* v. *Couper* (4) has satisfied me that the real objection to a surrender of shares does not lie in the fact that money has been paid by the company to acquire the shares. The objection is founded on a larger proposition. A company cannot be a shareholder in itself. Every surrender of shares, whether fully paid up or not, involves a reduction of capital, which is unlawful, except when sanctioned by the Court under the Companies Acts of 1867 and 1877. Forfeiture is a statutory exception, and is the only exception. For I regard a surrender, under circumstances which would justify a forfeiture, as merely equivalent to a forfeiture.

Kekewich J., while holding that the surrender was ultra vires and void, yet refused to restore the plaintiffs to the register. In this respect I am unable to follow his view. If the plaintiffs are, as I hold they are, still shareholders, it seems to me that their names ought to be upon the register, so as to give them the full status and advantage of shareholders, unless something has happened to deprive them of that right. I may

(1) (1890) 44 Ch. D. 534.
(2) [1895] A. C. 244.
(3) 12 App. Cas. 409.
(4) [1894] A. C. 399.

observe that no such case is pleaded in the defence. But, putting that aside, in substance the only suggestion that can be made is that, as the plaintiffs themselves removed their names and surrendered the shares, it is not right or just that the Court should help them. If, however, the transaction, though honest, was illegal and void, and if no Statute of Limitations applies, I fail to see what answer can be made to the plaintiffs' claim. If the company were wound up, I think the liquidator might put their names on the register, and hold them liable as contributories for 1*l.* per share. The original inability of the company to enter into the transaction applies equally to any suggested confirmation. Upon the whole, therefore, I think that the plaintiffs are entitled to the relief sought.

It is not, I think, a case in which any costs ought to be given.

Solicitors: *Bell, Brodrick & Gray, for W. S. Gray, Whitby; Radford & Frankland.*

W. L. C.

C. A. 1902 March 1, 17.

In re NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS, LIMITED.

[00129 of 1901.]

Company — Voluntary Winding-up — Compulsory Order — Contributory — Fully-paid Shareholder, Petition by—Surplus Assets—Directors—Presents of Shares—Fraud—Breach of Trust—Jurisdiction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 145.

A contributory of a company, even though he is the holder of fully paid shares, is not debarred from presenting a compulsory winding-up petition by the mere fact that there is a voluntary liquidation pending in which there is a surplus or probable surplus of assets for distribution. The jurisdiction to make a compulsory order is not limited to cases either where the voluntary liquidation is proved to be a sham or a fraud, or where the petition is supported by creditors, but may be exercised wherever the Court is satisfied that the voluntary liquidation is existing in circumstances which are likely to prejudice the shareholders, and that some benefit will result to the shareholders by the exercise of the jurisdiction.

During the pendency of the voluntary winding-up of a company having surplus assets, a petition for a compulsory winding-up order was presented by a fully paid shareholder:—

Held, that the case was not one in which the Court would exercise its jurisdiction to make a compulsory order, the evidence not being sufficient to shew that any benefit would thereby result to the shareholders. The petition was therefore dismissed, but, in the circumstances, without costs.

Decision of Wright J. affirmed.

In re Haycraft Gold Reduction and Mining Co., [1900] 2 Ch. 230, and *In re Gutta Percha Corporation*, [1900] 2 Ch. 665, approved.

In re Gold Co., (1879) 11 Ch. D. 701, considered.

THE above company was incorporated in May, 1883, under the Companies Acts, with a nominal capital of 500,000*l.*, in shares of 10*l.* each. It was promoted by one John Dixon Gibbs for the purpose of acquiring certain French patents for electrical distribution by means of secondary generators, the inventor being a Frenchman named Lucien Gaulard. The patents, which were originally considered to be of great value, were taken out in the joint names of Gibbs and Gaulard, who had agreed to share in the profits of the invention equally.

The patents were purchased by and assigned to the company

by Gibbs and Gaulard as the vendors, and the first directors of the company were nominated by Gibbs, who was himself on the board.

The amount of capital paid up or credited as paid up was 226,690*l.* It ultimately turned out that the patents were invalid in this country, and in January, 1898, the company passed resolutions for a voluntary winding-up and appointing a liquidator. This voluntary winding-up was still proceeding, and it appeared that there were surplus assets in the hands of the liquidator to the amount of between 3000*l.* and 4000*l.* after paying or providing for all the debts of the company.

In 1901 Adam Scott, the holder of 100 fully paid-up shares in the company, presented a petition for a compulsory winding-up, alleging that the voluntary winding-up resolutions were passed by directors and shareholders who were in fact merely the tools of Gibbs, and that the circumstances attending the formation and carrying on of the company required investigation by the Court. One specific allegation was that, upon the formation of the company in 1883, the directors, or some of them, received presents of shares from Gibbs, the promoter, and that these presents were in short bribes or improper commissions; and this allegation appeared to be supported by the evidence. Many of these shares were, soon after they were received, transferred by the donees to various persons.

A second allegation was that Gibbs—who, in consequence of the death of Gaulard in 1888, had acquired practically the entire control of the company, he being on the board of directors—with the complicity of his co-directors, compromised, to the detriment of the interests of the company, numerous actions brought by the company against French infringers of its patents.

A third allegation was that the compromise of the litigation against infringers, though it appeared to have been made by the directors under legal advice, was a dishonest compromise made by the directors for the purpose of favouring Gibbs, their benefactor, who had then got into an impecunious condition. Scott concluded his affidavit in support of the petition as follows: "From the inquiries I have made and the information

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I have obtained, I verily believe that the conduct of Gibbs and his co-directors from the date of the formation of the company to the date of the resolution to wind up voluntarily has been fraudulent, and that the interests of the general body of shareholders has, throughout the existence of the company, been sacrified for the personal benefit of the said Gibbs, who, with the sanction or acquiescence of his co-directors, has deprived them of their property; and that, if the order to wind up compulsorily is made and the investigation of and inquiries into the matters above referred to are carried out and the directors are ordered to account, it would result in the shareholders getting a substantial dividend."

In his affidavit in opposition to the petition, the voluntary liquidator stated that as liquidator he had investigated (though this was denied by Scott) the charges against Gibbs and his co-directors, and that to the best of his judgment and belief such charges could not be sustained, and that the taking of any proceedings against those parties would only involve the company in large costs, and would lead to no good result. With regard to the allegations in relation to infringement of the patents, the liquidator further stated that, owing to the invalidity of the patents and to the unfavourable result of much litigation which had taken place in various countries respecting the patents, it was impossible for the company to protect itself against other persons manufacturing machinery in competition with the company, and that, so far as he had been able to learn, the company had not now any cause of action against Gibbs in respect of the matters complained of.

The petition was supported, it was said, by a majority of the shareholders, and also by the only creditor of the company, the administratrix of Gaulard's estate.

Upon the hearing of the petition in April, 1901, Wright J. dismissed it with costs.

Scott appealed.

The appeal was heard on March 1 and 17, 1902.

Scott, the appellant, in person. Notwithstanding the lapse of time, the shareholders are entitled to have the frauds and

breaches of trust committed by their directors investigated, the Statute of Limitations being no bar in such a case: *In re Lands Allotment Co.* (1) Nor is the existence of a voluntary winding-up a bar to a petition for a compulsory order presented, as in the present case, by a holder of paid-up shares: *In re Haycraft Gold Reduction and Mining Co.* (2)

Gore-Browne, for the voluntary liquidator. I do not dispute the general proposition that a winding-up petition may be presented notwithstanding the existence of a voluntary winding-up. At one time it was suggested that s. 145 of the Companies Act, 1862 (25 & 26 Vict. c. 89), by in terms allowing a "creditor" to petition for a compulsory order, although there was a voluntary winding-up, excluded a "contributory": *In re Gold Co.* (3), though at the present day that cannot be contended. But the Court will consider what is the position of the petitioning shareholder or contributory. If, as in the present case, he is a fully paid shareholder, he is not, strictly speaking, a "contributory" at all within the meaning of the Act, for he has no interest as such in the winding-up of the company: Companies Act, 1862, s. 38, sub-s. 4; s. 74. Here, having regard to the lapse of time, and to the fact that during the past eighteen years the shares complained of must have passed through various hands, no good would result from the great expense which investigations would cause. Moreover, if the claim against the directors is on the ground of their having accepted bribes, it is now statute-barred: *Metropolitan Bank* v. *Heiron.* (4) Again, if the charge against them is that of having wrongfully received commissions, that creates the relation of debtor and creditor, and not that of trustee and cestui que trust entitling a shareholder to an order to bring money into court: *Lister & Co.* v. *Stubbs.* (5) There is no pretence here for saying that the voluntary winding-up can be interfered with as being a sham or a fraud, the two cases in which the Court will interpose by a compulsory order: *In re Gold Co.* (6)

(1) [1894] 1 Ch. 616, 631–2.
(2) [1900] 2 Ch. 230.
(3) 11 Ch. D. 701, 707, 709.
(4) (1880) 5 Ex. D. 319.
(5) (1890) 45 Ch. D. 1.
(6) 11 Ch. D. 709, 710.

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VAUGHAN WILLIAMS L.J. I do not think that we ought to allow this appeal. I say so, I confess, with some regret, because I am by no means satisfied that the complaints which have been urged by Mr. Scott, the appellant, are entirely without foundation. More than that, I am by no means sure that the matters he complains of are not matters which, if investigated, might result in increasing the fund which will have to be dealt with in this liquidation. This is a case in which the petition is by a contributory—by a fully paid shareholder; but it is not a case in which it can be alleged that the fully paid shareholders have no interest. On the contrary, there is already a surplus of several thousands of pounds which probably may come to be distributed amongst the fully paid shareholders; and I am by no means sure that the matters of complaint which Mr. Scott has gone into are not of such a character that, if they had been looked into at a different date and under different circumstances, the result might not have been to increase the assets of the company, that is, to increase the fund for division; and it is for that reason that I come somewhat reluctantly to the conclusion that this appeal must be dismissed.

In this case there is a voluntary winding-up in existence, which is still going on. It cannot at the present day be argued that the effect of the 145th section of the Companies Act, 1862, is to exclude a petition by a contributory after a voluntary liquidation. That section provides that "The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up." James L.J., in *In re Gold Co.* (1), says that, if the matter had come before the Courts for the first time, he should have been disposed to hold that the provision in the Act in favour of a petition for a compulsory order to wind up presented by a "creditor" after a voluntary winding-up excluded a petition by a "contributory," upon the principle of expressio unius est exclusio alterius. But plainly it cannot be said now that that is a proper con-

(1) 11 Ch. D. 701.

struction of the section. Primâ facie, therefore, there is a right in a contributory, under circumstances like the present, where there is a surplus or a probable surplus for distribution, to petition for a compulsory order, even though he be a holder of fully paid shares.

But it is said that that is a jurisdiction which ought only to exercised, either where it has been shewn that the resolution for voluntary liquidation was a sham or a fraud—that is, a resolution not bonâ fide passed for the purpose of winding up the business of the company, but for some oblique motive—or where the case is one in which the petition is supported by creditors. Those have been put as the two instances in which it is allowable for a contributory to petition, and the case of *In re Gold Co.* (1) is cited as the authority for that proposition. But I do not think that, if that case is examined, it will be found to be an authority for any such limitation. In the first place, it is to be observed that the particular frauds which were alleged in that case—that is to say, frauds of which Malins V.-C., who entertained the petition, spoke in very strong language (which language was approved of by James L.J.)—were frauds whereby the petitioner was induced to purchase shares on the market; and James L.J. points out in his judgment that, even if a shareholder has been induced to purchase shares on the market by reason of frauds of the company or of the directors, a compulsory order for winding-up is not his proper remedy, and that the existence of such frauds is not a ground for doing that which undoubtedly primâ facie ought not to be done, that is, making an order for a compulsory winding-up on the petition of a contributory, when there is a voluntary liquidation in existence. But when one sees what are the grounds upon which in that case the Lords Justices thought that such a petition by a contributory might properly be entertained, I think that the very cases which were cited in their judgments go to shew that it is not necessary, either that there should be fraud in the passing of the resolution, or that there should be frauds to be investigated, though the investigation might result in increasing the fund to be divided. The real truth of the

(1) 11 Ch. D. 701.

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matter is, that if the Court is satisfied (and I apprehend it will not be satisfied without very ample proof) that the voluntary liquidation is existing under such circumstances as are likely to prejudice the shareholders in the company, the Court, when once satisfied of that, has jurisdiction to make an order on the petition of a contributory, and will in such case make the order.

It will be observed that in *In re Gold Co.* (1) Baggallay L.J., in giving his judgment, refers to the case of *In re Fire Annihilator Co.* (2) as a case in which the jurisdiction to make a compulsory order at the instance of a contributory was properly exercised; and it will be seen that in that latter case the real ground upon which the petition was supported was that the voluntary liquidation (which had been going on for five years) was being conducted in so dilatory a manner that it was impossible to regard it as an effective liquidation. But I see no reason why the same principle should not be equally applied whether the voluntary liquidation is non-effective by reason of delay, or whether it is non-effective by the determination (I am not saying that is the case here) of the voluntary liquidator to shield certain debtors of the company, or to refuse to investigate claims of the company which primâ facie are good. It seems to me that in any such case the Court having the jurisdiction ought to exercise it; and that seems to me the ground upon which Cozens-Hardy J. proceeded in the two cases in [1900] 2 Ch. which have been referred to. One of those cases is *In re Haycraft Gold Reduction and Mining Co.* (3) The learned judge there says this (4): "I do not, however, wish to decide this case solely on the ground of the invalidity of the extraordinary general resolution. I shall, therefore, now assume that there is a valid voluntary winding-up. It is clear that such a voluntary winding-up is not a legal bar to the jurisdiction of the Court to make a compulsory order on the application of a shareholder." Thus far I entirely agree. That shews plainly that there is a jurisdiction. Then he

(1) 11 Ch. D. 701.
(2) (1863) 32 Beav. 561.
(3) [1900] 2 Ch. 230.
(4) Ibid. 237–8.

proceeds: "That was decided by Sir John Romilly in 1863 in *In re Fire Annihilator Co.* (1) It is true that the company was there being wound up under the Act of 1856 and not under the Act of 1862; but I do not think the difference is material. That decision was recognised by the Lords Justices in *In re Gold Co.* (2) If, therefore, the Court has jurisdiction to make the order, I cannot hold that this jurisdiction ought to be fettered in the manner suggested in argument"—that is, ought to be limited to the two cases that I have already mentioned, the one where the resolution for winding-up was improperly obtained or was a sham, and the other where the petition is supported by creditors. Then Cozens-Hardy J. says: "The existence of a voluntary winding-up is a strong reason why the Court should decline to interfere, but circumstances may justify interference. The most common instance, no doubt, is where the Court holds that the resolution to wind up voluntarily has been passed fraudulently, but that is not exhaustive. I cannot regard the resolutions which have been passed as an honest exercise of the wishes of the shareholders with regard to the winding-up of the company. No plausible reason for objection on the part of a shareholder to a compulsory winding-up can be suggested. Unless I make the order, the company will be dissolved, the books will be destroyed, and the directors, promoters, and others will escape the risk of being called upon to pay large sums into the coffers of the company." Then, after some further observations, he says: "There is nothing in the *Gold Company's Case* (2) or in any other case which prevents me, in circumstances such as these, from exercising the jurisdiction which I possess. I think it is eminently just and equitable that this company should be wound up by the Court, and such inquiry and investigation be made as is contemplated by the statute."

There is a second decision of Cozens-Hardy J. to the same effect—*In re Gutta Percha Corporation* (3); but I do not think it is necessary to go into it, for it does not seem to me to depart in principle in the slightest degree from the previous case.

Now, let us apply that principle to the case before us.

The allegations which are now made by Mr. Scott undoubtedly

(1) 32 Beav. 561. (2) 11 Ch. D. 701. (3) [1900] 2 Ch. 665.

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are allegations of fact which, if relevant at all, are intended as the basis of an assertion that if this voluntary liquidation goes on there is a risk that the debtors of the company who might be called upon to pay large sums into its coffers will escape; and if I were satisfied that that were so, I should think this appeal ought to succeed. Mr. Scott has, however, failed to satisfy me of that. Now let me take his allegations one by one. His first allegation is an allegation that various directors had presents of shares made to them by Mr. Gibbs, one of the vendors and one of the patentees. That that allegation is true there can be no doubt whatsoever. That it was improper that those presents should be made is, to my mind, also beyond a doubt. But I am not satisfied that in any of these cases the liquidator, whether under the voluntary liquidation or under a compulsory liquidation, would be well advised in taking proceedings to recover anything from these directors in respect of these presents of shares to them. So far as many of the shares are concerned, they have passed away from the donees and have been transferred elsewhere; and, that being so, if any claim were made or any proceeding taken against these directors in respect of the presents they received, the claim would now be statute-barred. These presents were received seventeen or eighteen years ago, and I do not think that a prudent liquidator would spend the funds of the company in his hands in any such litigation. However improper these presents may have been, it is of no use to discuss the matter if the claims have been rendered stale by the Statute of Limitations, which seems to me to be the case here.

The second of the grounds that Mr. Scott proceeded upon was that in some way or other Mr. Gibbs and the directors, who were in the position of his tools, had sacrificed the interests of the company of which they were directors in favour of French friends of Mr. Gibbs; but to my mind the affidavits wholly fail to substantiate this charge.

Then there only remains one other charge to notice, and to my mind it is really the most important of the charges made. It is suggested that the compromise of litigation was a dishonest compromise made by these directors for the purpose of favouring Mr. Gibbs, whom, Mr. Scott says, they had some

substantial reasons for favouring. With reference to this third charge, I cannot say that there is no evidence to support it. Primâ facie, I think these directors did make a bad bargain in effecting the compromise; but it is perfectly plain that they put themselves in the hands of their legal advisers, who they had a right to expect would advise them for the best, and who, I have no doubt, did advise them for what they considered the best. It seems to me that this compromise was one recommended by those legal advisers, and I do not think it affords sufficient reason for exercising the jurisdiction which we undoubtedly possess to make a compulsory order. As Cozens-Hardy J. pointed out in the judgment I have read, the jurisdiction is one which the Court ought not too easily to exercise; and I do not think that sufficient has been made out here to justify us in exercising that jurisdiction. But I am not surprised that this appeal has come before us, and, after all I have heard, I think that, although the appeal is dismissed, there ought to be no costs.

STIRLING L.J. I am of the same opinion. I also think there is jurisdiction in a proper case to make a winding-up order on the petition of a contributory, notwithstanding that a resolution for voluntary winding-up has been passed. It is quite true that, as a general rule, after such a resolution has been passed a compulsory winding-up order ought not to be made; but there are exceptions, undoubtedly, to that rule. These exceptions are generally stated to be, that it must be made out either that there was a case of fraud in passing the resolution for voluntary winding-up, or that the petition is supported by creditors. I think that that is too narrow a statement of the exception if the word "fraud" is used in its strict legal meaning. The case in which that statement is to be found is that of *In re Gold Co.* (1); but when one looks at the judgments which were given by the Lords Justices in that case, it appears to me that not one of them intended that so limited a meaning should be attached to the word "fraud." James L.J., who delivered the first judgment, does not use the word "fraud" at all. Referring to the case of *In re West*

(1) 11 Ch. D. 701.

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Surrey Tanning Co. (1) as being, in his opinion, the leading case and the one which seemed to establish the principle, the Lord Justice says (2): "There was one man whose conduct was impeached, whose dealings and transactions with the company required investigation, and he himself had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings." The Lord Justice goes on to say that he can conceive a case in which that might apply to the majority of the shareholders. Then he says: "I am of opinion that, to enable the Court to make such an order as the Vice-Chancellor has made, the case must, at all events, be brought up to a case of that kind—that is to say, to a case in which, from the circumstances which have occurred, the Court sees that the shareholders cannot be trusted to determine the matter for themselves." And I think that the learned Lord Justice did not mean to limit that to circumstances which occurred at the time when the voluntary resolution was passed, but that he meant to extend it to circumstances which occurred subsequently to the commencement of the voluntary winding-up. Baggallay L.J. did use the word "fraud," and he states the rule to be derived from the cases which had been decided down to 1879 (when this decision was given) as follows (3): "The result of the cases appears to be this, that the Court will not entertain a petition from a contributory after there has been a voluntary winding-up unless it is shewn that there has been fraud." But he goes on immediately afterwards to shew that the word "fraud" is not there meant to be used in the strict legal meaning; for he says: "There may be special circumstances, perhaps not amounting to fraud in the ordinary and every-day meaning of the word, but which are yet almost equivalent to fraud, and shew that there ought to be a compulsory order." There were such circumstances, he says, in *In re Fire Annihilator Co.* (4), where the Court treated the voluntary winding-up as if there had been no voluntary winding-up at all, and made a compulsory order. And with reference to the case of *In re West*

(1) (1866) L. R. 2 Eq. 737.
(2) 11 Ch. D. 710.
(3) 11 Ch. D. 716.
(4) 32 Beav. 561.

Surrey Tanning Co. (1), which had been relied upon by James L.J., he says: "But even in that case there were special circumstances which I think would have justified the interference of the Court, namely, that the voluntary winding-up had been obtained, if not by fraudulent means within the ordinary intent and meaning of the word, yet by an overpowering body of shareholders acting under the influence of a single person." Bramwell L.J., who was the third member of the Court, expressed his entire agreement with what had been said by James L.J. and Baggallay L.J., and confines his observations to a particular matter which does not affect the present case. I think, therefore, that, if the judgments in *In re Gold Co.* (2) are examined, they quite justify the view which was taken in *In re Haycraft Gold Reduction and Mining Co.* (3) by Cozens-Hardy J., namely, that the Court has jurisdiction to make an order in a proper case. But I think that the Court ought to be very careful how it exercises that jurisdiction, and ought not to make an order for compulsory winding-up unless it is satisfied that some benefit will thereby result to the shareholders.

For the reasons which have been given by Vaughan Williams L.J., I am not satisfied that such is the case here, and I therefore agree that the appeal ought not to be allowed.

COZENS-HARDY L.J. I agree. I am unwilling to refer to my own decisions in *In re Haycraft Gold Reduction and Mining Co.* (3) and *In re Gutta Percha Corporation* (4); but, having regard to what has been said to-day by the learned Lords Justices, I may say that I adhere to the view of the law which I there stated. I cannot, therefore, doubt that the jurisdiction is sufficient; still less can I doubt that, upon the materials before us, no good would result to the assets of the company if we were now to make a compulsory order.

I therefore agree in thinking that the appeal ought to be dismissed.

Solicitors: *E. Betteley; Campbell, Reeves & Hooper.*

(1) L. R. 2 Eq. 737.
(2) 11 Ch. D. 701.
(3) [1900] 2 Ch. 230.
(4) [1900] 2 Ch. 665.

G. I. F. C.

C. A.
1902
April 15, 16, 17; *May* 5.

In re ALDAM'S SETTLED ESTATE.

[1900 A. 1283.]

Settled Land—Tenant for Life—Power of Leasing—Mining Lease—Varying Minimum Rent—Way-leave—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *ss.* 6, 7, *sub-s.* 2; *s.* 9, *sub-s.* 1 (*i.*, *ii.*); *s.* 17, *sub-s.* 1; *s.* 53.

A tenant for life, in granting a mining lease, under the power conferred upon him by the Settled Land Act, 1882, may reserve an acreage rent with a minimum rent commencing in the second year of the term granted, and increasing year by year during the early part of the term.

The lease may also provide for the cesser of the minimum rent, when all the minerals demised have been paid for at the acreage rent reserved, and may also contain a grant of a way-leave for foreign minerals to continue during the whole term, and subject to a nominal rent after the cesser of the minimum rent.

Decision of Byrne J. reversed.

SUMMONS by the tenant for life under a settlement for the determination of the following questions:—

(1.) Whether by virtue of the Settled Land Acts he, as such tenant for life, had power to grant a lease of a seam of coal under an estate situate at Wickersley, in Yorkshire, for a term of sixty years, reserving a minimum yearly rent not commencing until the second year of the term and increasing year by year until the fifth year of the term.

(2.) Whether he had power to insert in the lease a proviso for the cesser of the minimum rent when all the coal demised by the lease (except such parts thereof, if any, as in accordance with the provisions of the lease were not to be worked or paid for) should have been paid for at the acreage rent reserved by the lease.

(3.) Whether the lease might contain a way-leave for foreign coal to continue after such cesser as aforesaid at a nominal rent, or whether a substantial rent must be reserved for such way-leave, and whether such rent could be made to commence upon such cesser.

(4.) If any of the above questions were answered in the negative, then that the applicant might be authorized under

s. 10 of the Settled Land Act, 1882, to grant such lease as aforesaid.

William Aldam, by his will dated December 18, 1884, devised his real estate to the use of his son William Wright Warde Aldam (the applicant) for life, with remainder to the use of such one or more of his sons or daughters, for such estates in tail or any lesser estates as he should by will appoint, and in default of such appointment to the use of William St. Andrew Warde Aldam, the son of the applicant, for life, with remainders over. And the testator declared that every estate for life under the limitations aforesaid should be without impeachment of waste, and also that under a mining lease, whether the mines or minerals leased were already opened or in work or not, there should be from time to time set aside as capital money arising under the Settled Land Act, 1882, two-thirds of the rent, and the residue of the rent should go as rents and profits.

The testator died on July 27, 1890.

The applicant was now tenant for life in possession under the will, and his son, the tenant for life in remainder, was an infant.

On February 13, 1900, the applicant entered into an agreement with the Dalton Main Collieries Company, Limited, whereby he agreed, as tenant for life under the settlement created by his father's will, to lease the Barnsley Thick Seam of coal under the settled estate for a term of sixty years from January 1, 1898.

The material clauses of the agreement were as follows :—

"(3.) The royalty or acreage rent shall be at the rate of 30*l.* per foot per acre, but due allowance shall be made for bad, faulty, or unworkable coal, or coal so thin, or so cut off by faults of such magnitude that it cannot be worked without loss. The lessees shall also pay a similar royalty for all coal and slack other than the Barnsley Thick Seam got in the drifting and sold off. (4.) The minimum or certain rent is to be for the first year nil; for the second year, 2*s.* 6*d.* per acre; for the third year, 5*s.* per acre; for the fourth year, 10*s.* per acre; and for the fifth and each succeeding year, 1*l.* per acre. The minimum rent shall begin to be paid as from January 1,

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1899. (6.) Undergettings may be made up at any time during the term. (7.) When all saleable coal, except such parts (if any) as are not to be worked or paid for, shall have been worked or paid for, a nominal rent of 10*s.* shall be paid for the remainder of the term in substitution for the royalty and minimum rents. (9.) No way-leave rent is to be paid for any other part of the Barnsley Thick Seam of coal under any other land in the parish of Wickersley. (13.) The lessees are to commence working the coal with all reasonable speed, and to work the seam during the lease with all reasonable diligence, and bring to the surface as much coal as can reasonably be got with proper diligence."

The agreement contained no other express provision about way-leave, but there was a stipulation that "all other usual conditions and covenants in leases of a like nature which the lessor or lessees may require shall be embodied in the lease."

The property, the subject of the agreement, consisted of a large number of detached pieces of land, intermixed with the land of other owners, and it could only be profitably worked from a pit situated (like that of the intended lessees) on property not forming part of the settled estate.

In consequence of doubts raised by the trustees of the will for the purposes of the Settled Land Acts, this summons was taken out for the determination of the above questions.

The affidavits filed in support of the summons (which were uncontradicted) shewed that it was usual in the district to charge no minimum rent during the first year of a lease of mines, and also to charge a gradually increasing rent in the next few succeeding years, till a certain limit was reached, which was always below the value of the probable annual amount of coal got, and that this was reasonable, having regard to the great initial outlay and time required for the opening and development of a new mine. After the hearing of the appeal had commenced, an affidavit was (at the suggestion of the Court) made to the effect that the rent reserved under the proposed lease was the best rent which could be obtained, and that it would be beneficial to all the persons entitled under the settlement.

John Dixon, for the summons.

L. S. Bristowe, for the trustees and the infant tenant for life in remainder.

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1901. Nov. 20. BYRNE J. held, for the reasons mentioned in the judgment of the Master of the Rolls and of Stirling L.J., that the lease proposed could not be granted, and he could not sanction the lease under the special power conferred upon the Court.

The order as drawn up contained a declaration:—

"(1.) That the applicant as such tenant for life as aforesaid has no power to grant a lease as aforesaid reserving a minimum yearly rent not commencing until the second year of the said term and increasing year by year until the fifth year of the said term as proposed. (2.) Assuming there is no other objection to the proposed lease, the applicant has power to insert in such lease a proviso for the cesser of the minimum rent when all the coal demised by the lease, except such parts thereof (if any) as in accordance with the provisions of the lease are not to be worked or paid for, shall have been paid for under the terms of the lease, and a proviso permitting undergettings to be made up notwithstanding the determination of the term, but so that the term shall determine at the period of the cesser of the minimum rent. (3.) That if the way-leave for foreign coal continues after the cesser of the minimum rent, a substantial and proper rent must be paid for such way-leave after such cesser."

W. C. D.

C. A.

The tenant for life appealed. The appeal came on for hearing on April 15, 1902.

Neville, K.C., and *John Dixon*, for the appellant. (1) It is

(1) The following are the material sections of the Settled Land Act, 1882:—

Sect. 6: "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

"(ii.) In case of a mining lease, sixty years."

Sect. 7: "(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

"(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case."

Sect. 9: "(1.) In a mining lease—

"(i.) The rent may be made to be ascertainable by or to vary according

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submitted that the learned judge has taken too narrow a view of the legislation under the Settled Land Act, 1882. That Act was intended to go further than the Settled Estates Act, 1877, and to place a tenant for life, as regards the beneficial dealing with the settled land, in the same position as an absolute owner.

In pursuance of the power given by the Act, the tenant for life has agreed to grant a mining lease for sixty years. The first question is whether, in reserving a minimum rent, he can stipulate that it shall not commence until the second year, reserving no rent whatever for the first year. It is contended that he can. He need not have fixed any minimum rent at all, though he has in fact done so for part of the term; and this is

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to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

"(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent."

Sect. 10 empowers the Court to sanction in certain cases the granting of a mining lease on different terms and conditions.

Sect. 11: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

Sect. 17: "(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land."

Sect. 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

in accordance with the practice of the district, for the evidence establishes the existence of a custom of charging no minimum rent at all for the first, second, or third year of the term. The object of that is to enable the lessees to make preparations for the actual working, and to relieve them from an undue burden of rent during the time in which it is impossible for them to get the coal. If they should happen to get any coal the first year, they would pay, not any minimum rent, but so much rent for the coal actually gotten. Minimum rent is nothing more than rent on account: when the lessee pays for the whole coal gotten in one year and the total sum paid exceeds the minimum rent, he is released from payment of the minimum rent on account. By the will in this case, two-thirds of the rent, whatever it is, have to be retained as capital, so that the remainderman's interest is well guarded. The Act does not attempt to define all the terms of a mining lease; it insists upon certain provisions and leaves the rest to local custom. What is aimed at in s. 10 is the length of the lease, or some special form of rent.

[STIRLING L.J. The pinch of this case is, whether you are getting "the best rent" that can be obtained; none of the affidavits at present deal expressly with that point: they do not say that the best rent has been reserved, or how it was arrived at.]

Evidence on this point can be supplied (1); but it is admitted that this is a reasonable lease and beneficial for all parties. The reservation of a way-leave for foreign coal, to continue after the cesser of the minimum rent, is all part of the consideration: it is a very usual provision in this district. Sect. 17 does not seem to require the reservation of a separate rent for a way-leave.

[STIRLING L.J. Suppose that only a varying rent were reserved and no minimum rent, and that the lease contained covenants as to the working of the coal, would it not be possible to provide by the covenants for a progressive working without raising the rent? So that, for instance, in the second year

(1) An affidavit to this effect was (as above stated, p. 48) produced before the conclusion of the argument.

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there should be worked so much coal as would produce the minimum rent intended for that year, and so on.]

Such a covenant might no doubt be framed, but it might in practice be impossible to fulfil it. The other lessors would no doubt insist upon similar covenants.

[STIRLING L.J. Liquidated damages for breach of the covenant might be provided.]

That would not be a rent, and the lessor could not distrain for it.

[STIRLING L.J. Without infringing the rule that there must be a fixed minimum rent, you could, in the way I have suggested, bring about the same result as is here aimed at.]

L. S. Bristowe, for the trustees of the settlement and the infant remainderman. The questions are: (1.) Whether an increasing minimum rent is admissible? (2.) Whether the minimum rent can be made to cease after a fixed time?

The cases which were decided before the Settled Land Act upon leasing powers in settlements illustrate the principles on which the Court will act now: *Lord Mountjoy's Case* (1); *Doe* v. *Harvey* (2); *Hallett* to *Martin* (3); *Montgomery* v. *Charteris* (4); Sugden on Powers, 8th ed. pp. 785, 786; Farwell on Powers, 2nd ed. pp. 624, 625. These authorities do not lay down an arbitrary rule of law, but are based on justice. The principle is that it would not be just that part of the payment made by the lessee for the enjoyment of the demised minerals after the termination of the life interest should be received by the tenant for life.

[STIRLING L.J. The coal might be all worked out during the tenancy for life.]

A minimum rent is not necessarily a payment in advance for the coal gotten. There is a demise of the Barnsley seam—of the space occupied by the seam.

[COLLINS M.R. It is essential that the lessees should be able to get the other coal as well as the particular pit demised. The object is to give them time to receive payment for the coal. The way-leave has no relation to the time which will

(1) (1589) 5 Rep. 3 b.
(2) (1823) 1 B. & C. 426; 25 R. R. 444.
(3) (1883) 24 Ch. D. 624.
(4) (1817) 5 Dow, 293.

be occupied in getting any particular piece of coal; it relates to the time which will be required for carrying out the whole scheme.]

The tenant for life could not grant the lease at all without the power conferred by the Act. It is for this power that he has to pay the price of capitalizing one-fourth of the rent received under the lease. But, when that price has been paid, the tenant for life must still grant the lease on terms which will be fair as between himself and the remainderman. The "best rent" must be a uniform rent, unless the Act authorizes a varying rent.

[STIRLING L.J. Your argument is that as regards the way-leave the old law still applies, and that this provision that one-fourth of the rent shall be capitalized applies only to the coal granted.

COZENS-HARDY L.J. In *In re Gladstone* (1) Lindley M.R. said: "The Settled Land Act was intended to get rid of a number of old authorities, and to enable a tenant for life to do that which he could not have done before the Act. I do not think that any case decided before the Act can have any application to the present case."]

The words "best rent" were always used in a well-drawn leasing power. When, as in the present case, the right to occupy the space demised is a valuable right (independently of the coal contained in that space), a rent ought to be reserved for it—something in the nature of an occupation rent as long as the occupation lasts. It ought to be a substantial rent, not, as in the proposed lease, a minimum rent of 10*s*.

The meaning of s. 17 is that a way-leave cannot be granted unless a mining lease is being granted at the same time; a way-leave cannot be granted separately. Therefore the payment for the coal might be kept separate from the payment for the way-leave. The payment for the coal would cease when it is worked out, while the payment for the way-leave would continue. The same term might be granted for each. The Act does not expressly say that there must be a separate rent for the way-leave; but it would not be fair as between the tenant

(1) [1900] 2 Ch. 101, 105.

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for life and the remainderman that a rent should be paid in the earlier part of the term for that which is to be enjoyed in the latter part. If the payment for the way-leave is included in the payment for the coal, then payment is made in advance for that which will probably be enjoyed after the remainder has fallen into possession. The meaning of a "minimum rent" was explained by Erle C.J. in *Jegon* v. *Vivian* (1), when he said: "Beyond the royalty, a money rent is usually reserved. This money rent is some security that the mine will be worked, as it is a dead loss if no coal is raised; it is also some security that the duration of the lease will be limited to the time in which all the coal will be raised, because, after the coal is exhausted, the money rent is again a dead loss." The right to occupy the space demised is of value only for the purpose of the way-leave.

[STIRLING L.J. You say that the remainderman would be deprived of the valuable right of obtaining rent for the way-leave after the coal is worked out?]

That would be the effect of the lease. The lessees are purchasing two things: (1.) the coal; (2.) the right to carry foreign coal over the lessor's land.

[COLLINS M.R. The Act authorizes the reservation of an acreage rent, and the coal might be all worked out before the remainder falls into possession.]

By s. 53 the tenant for life is placed in the position of a trustee for the other persons interested.

Neville, K.C., in reply.

Cur. adv. vult.

May 5. COLLINS M.R. read his judgment as follows:—This is an appeal from the decision of Byrne J. upon certain questions as to the validity under the Settled Land Acts of certain provisions in an agreement for a mining lease entered into by the tenant for life under a settlement made by the will of William Aldam, deceased. The first question is whether the tenant for life has power under the Act to grant a mining lease for sixty years, reserving a minimum yearly rent not com-

(1) (1865) L. R. 1 C. P. 9, 34.

mencing until the second year of the term, and increasing year by year until the fifth year of the term. This question the learned judge has answered in the negative. [His Lordship then referred to the above sections of the Settled Land Act, 1882, and stated the effect of the evidence as above mentioned, and continued :—]

Byrne J. was of opinion that the fact that no minimum rent was reserved in the first year was fatal, though he would have been satisfied had it been fixed at a nominal amount only, and saw no objection to the graduated scale, provided the maximum rent was made to begin in the fifth year, or on the death of the tenant for life if he died before that date. He based his view on this latter point on the ground that by the will a second tenant for life might possibly succeed before the remainderman. I cannot agree with the learned judge in his answer to the first question. The Settled Land Acts, as the learned judge admits, contain no provision making a minimum rent obligatory in the first year. There need not be any minimum rent at all, though there is power to reserve one. And, while there need be no minimum rent, there may be an acreage rent according to the quantities gotten, which might, and probably would, be nothing in the first year. Whence then comes the obligation to reserve a minimum rent in the first year if one is reserved at all ? The epithet "fixed" does not create it. That expression is, I think, used only in contradistinction to an acreage rent fluctuating according to the amount gotten, and a rent would be "fixed" for any year in which a sum defined beforehand was reserved as rent. The learned judge founded his view upon the fact that s. 4 of the Settled Estates Act, 1877, permitted a peppercorn, or any rent smaller than that ultimately made payable, to be reserved during the first five years of mining and building leases, whereas in the Settled Land Act, 1882, though there is such a provision as to building leases (s. 8), it is not extended to mining leases in s. 9. But in the earlier legislation building and mining leases were dealt with together in one section ; in the present Act they are dealt with separately ; and, as Mr. Neville pointed out, a peppercorn may well have been treated as strictly applicable to a building lease creating the true

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relation of landlord and tenant, but as inapt in the case of a mining lease, which is really in its essence rather a sale at a price payable by instalments than a demise properly so called. But, however this may be, I think the provisions of the Settled Estates Act have very little bearing on the construction of the Settled Land Acts, which, as was explained in *Bruce* v. *Marquess of Ailesbury* (1), rest on a very different principle. In that case Lord Macnaghten, speaking of the Settled Land Act, said (2): "The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In those Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. They must be duly considered by the trustees or by the Court whenever the trustees or the Court may be called upon to act. But it is evident I think that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests." A similar observation was made by Lindley M.R. in *In re Gladstone* (3), where he said: "The Settled Land Act was intended to get rid of a number of old authorities, and to enable a tenant for life to do that which he could not have done before the Act. I do not think that any case decided before the Act can have any application to the present case." Here, on the evidence, the stipulation in question is, from a business standpoint, reasonable and proper, if the best price for the coal is to be realized, and can clearly be no disadvantage to the remainderman, even if that were the paramount consideration, which it is not. It is, I think, clear on the evidence that this agreement was made honestly in the interest of all parties, and the

(1) [1892] A. C. 356. (2) [1892] A. C. 364.
(3) [1900] 2 Ch. 105.

possible difference to a tenant for life succeeding before the fifth year must not be allowed to defeat an arrangement which is the best that can be made for the development of the estate.

Questions 2 and 3 are as follows: [His Lordship read them.] The learned judge has treated these questions together. As to the first of them, he holds that the proposed cesser of the minimum rent can only be permitted provided the term be made to determine at the period of the cesser and, as to the second, that a substantial rent must be paid for the way-leave after such cesser. He points out that no separate rent is reserved for the way-leave, and that, though this is permissible under s. 17, yet the effect of the provisions referred to in these questions would be that, if all the coal were worked out, there would practically be a free way-leave for the rest of the term, payment having been already made for it in the rent, and that, if the tenant for life were to live till all the coal was got out, the remainderman "would for the residue of the term be subject to the burden of the way-leave, without getting anything but a nominal payment for what might have been granted for a very substantial rent." I think the same considerations dispose of these difficulties. On the evidence it would seem to be a practical impossibility to deal with the way-leave in any other way. The coal under the land of the lessor (which consists of scattered plots) is only a small part of a seam lying under the land of several different owners, and to be properly developed under modern conditions it must be worked as part of a larger whole. The provisions in the lease are those which have been found to be the most workable in practice, and are those which are in general use in the district. Every special or unusual clause, such as those suggested by the learned judge, would mean a fetter put on the development of the estate, and would involve a diminution in the rent which the lessee would be prepared to give for the coal. The consideration given by the lessee and the rights he obtains in return are all part of one bargain, and the fact that the coal under the lands of many different owners has to be worked as part of one enterprise, as to which it is impossible to say beforehand how and in what directions it is to be most economically carried out, makes it

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essential that the way-leave for foreign coal should be co-extensive with the term. By a provision in the will in this case, two-thirds of the rent are to be set aside as capital moneys, instead of one-fourth, which is all that the statute (s. 11) exacts in the case of a tenant for life not impeachable for waste, and the remaindermen will, therefore, suffer no injustice. It is, of course, impossible in every case to put them in precisely the same position, at whatever period during a lease the tenant for life may die, but primâ facie, where a substantial proportion is set aside when received for the benefit of the remaindermen, it is best for all parties that the highest obtainable price should be secured for the coal and the way-leave, even though in certain contingencies the rent should drop to a nominal figure before the end of the term. It seems to me that there is nothing in the statutes to vitiate the provisions in question, and that this appeal must be allowed.

STIRLING L.J. read the following judgment:—In dealing with the questions raised in this case, it must, I think, be borne in mind that the Legislature has, on grounds of public policy, considerably increased the rights which tenants for life of real estate have at law. The alterations are very striking in the case of mining leases. A tenant for life impeachable for waste, and consequently unable at common law to work unopened mines, is now authorized to grant a mining lease of such mines, and to receive for his own use one-fourth of the rent reserved by the lease. It is also to be borne in mind that the object of a mining lease is to enable the lessee to remove for his own benefit the minerals demised, and widely differs from that of a lease of a portion of the surface where the lessee is expected, after enjoying the use and occupation of the demised property for a term of years, to deliver it up to the lessor in the same state and condition as at the commencement of the lease. The rent reserved by a mining lease rather resembles an instalment of purchase-money for the demised minerals than what is understood by rent reserved on an ordinary demise of the surface.

Sect. 7, sub-s. 2, of the Settled Land Act, 1882, applies to

all leases granted under the Act, whether of the surface or of minerals. Its provisions are imperative, and require the best rent to be reserved that can reasonably be obtained, regard being had to all the circumstances of the case. The word "rent" in this clause includes such rents or royalties as are authorized by the Act to be reserved in mining leases: see s. 2, sub-s. 10 (ii.). In determining whether the best rent has been reserved, the Court, on a question arising between the tenant for life on the one hand and the trustees of the settlement and beneficiaries on the other, must consider, not only whether it is the best rent which could be obtained as between an absolute owner and the lessee, but also whether it is such regard being had to the interests of all parties entitled under the settlement: see Settled Land Act, 1882, s. 53.

Sect. 9 of the Act, which deals with mining leases, is not imperative, but merely permissive. Sub-s. 1 (i.) authorizes the reservation of a rent varying according to the acreage worked or the quantities of minerals gotten. Sub-s. 1 (ii.) authorizes the reservation of a fixed or minimum rent, either with or without power for the lessee to make up deficiencies in working in case the rent, according to acreage or quantity, falls short of the fixed or minimum rent. It is not disputed that under this sub-section a varying rent may be reserved without the addition of a fixed or minimum rent; but it is said that, if a fixed or minimum rent be reserved, it must be a uniform rent. This does not appear to me to be expressed by the language of the sub-section, on which (regard being had to the policy of the Act) I do not think that a narrow construction ought to be placed. In support of his contention the learned counsel for the respondents referred to *Lord Mountjoy's Case* (1) and *Doe* v. *Harvey*. (2) Both were cases of surface leases granted under powers very much more limited in their terms than those conferred by the Settled Land Act, 1882. I assume, without deciding, that these cases do apply to surface leases granted under the powers of the Settled Land Act, 1882, except where varying rents are expressly authorized; but no case has been cited in which they have been applied to fixed or minimum

(1) 5 Rep. 3 b. (2) 1 B. & C. 426; 25 R. R. 444.

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rents under mining leases where a varying rent was authorized. It was also pointed out that in s. 8, sub-s. 2, it is expressly provided that a nominal or other rent less than the rent ultimately payable under a building lease might be reserved for the first five years of the term, while s. 9 contains no such provision. The answer appears to be that such express provision was unnecessary, for sub-s. 1 (i.) of s. 9 authorizes the reservation of a rent varying with the actual working, and sub-s. 1 (ii.) does not make the reservation of a fixed or minimum rent imperative.

Having regard to the difference already pointed out between surface and mining leases, I am unable to see good ground for holding that as a matter of law the fixed or minimum rent referred to in s. 9, sub-s. 1 (ii.), must be a uniform rent, and Byrne J. was of this opinion. But he held that the provision that no rent should be paid during the first year was unauthorized, and he appears to have considered the proposed arrangement open to objection, as I understand, in the interests of the remaindermen, and particularly of the infant son of the tenant for life, who is also a tenant for life.

The object of a fixed or minimum rent is two-fold: first, to provide a specified income on which the tenant for life may rely; and secondly (and this is the more important reason), as a security that the mine will be worked, and worked with reasonable rapidity: see the remarks of Erle C.J. in *Jegon* v. *Vivian*. (1) In the present case it is proposed that the lessee shall pay no rent during the first year, and rents less than that ultimately payable during the second, third, and fourth years. If the fixed or minimum rent may vary, as I think it may, I do not see why in a particular year it may not be nil. The scheme is framed as it is in the view that during the first four years the lessee will in all probability be under the necessity of expending large sums for the purpose of developing the coal-field, and the arrangement is both reasonable and usual as between lessor and lessee. Primâ facie, as between tenant for life and remainderman, it is for the benefit of the remainderman, for the less the dead rent paid before he comes into possession,

(1) L. R. 1 C. P. 34.

the smaller will be the deficiencies in working to be made up during the period of his possession.

It is also proposed that the fixed minimum rent shall cease when all the coal has been worked or paid for. This operates as an inducement to the lessee to work rapidly. The consequence may be that the workable coal will be exhausted during the tenure of the tenant for life, and thus the provision may operate to the disadvantage of the remainderman. In the present case two special circumstances are to be regarded. First, the large proportion, namely, two-thirds, of rent which the settlor has directed to be capitalized, of which the remainderman will have the benefit. Secondly, the peculiar nature of the property, which is not continuous, but is made up of a large number of small pieces of land situate amidst the properties of other owners. Such a property cannot be advantageously worked for coal by itself: it must almost of necessity be worked along with the lands of other owners, as is, in fact, proposed to be done. If the working of such a mineral property be too long delayed, it may get entirely isolated and become workable (if at all) at a great disadvantage. It seems to me that these circumstances may well justify the proposed arrangements as between tenant for life and remainderman, and I confess I cannot see that the circumstance that the next remainderman is an infant tenant for life necessarily requires the Court to hold that a substantial rent ought to be reserved during the first year.

A further point remains to be considered, namely, whether, if the way-leave for foreign coal continues after the cesser of the minimum rent, a substantial rent must be reserved in respect of it.

Now, s. 17, sub-s. 1, of the Settled Land Act, 1882, authorizes mining leases to be made with a grant of (inter alia) powers of working, way-leaves and rights of way. There is nothing in the section which requires a separate rent to be reserved in respect of any such grant. The propriety of the reservation of a separate rent must depend on the particular circumstances of the case under consideration. Here, again,

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the nature of the property must be considered, and with it this further fact (which is of great importance), that no way-leave rent is to be paid to the owners of the lands through which the coal demised must be carried in order to reach the surface, so that the lessees are enabled to give a larger acreage rent than they otherwise would. I think that such a state of things may well justify the reservation of a nominal way-leave rent after the cesser of the minimum rent.

In the result, therefore, I think that there is nothing in the proposed lease which can, as a matter of law, be held to violate the requirements of the Settled Land Act, 1882—that there should be reserved the best rent that can reasonably be obtained, regard being had to all the circumstances of the case, and that due regard should be had to the interests of all parties entitled under the settlement. Whether, in fact, any particular lease satisfies those requirements must depend on the evidence. In cases of this sort I think the Court ought not to rely on mere general statements couched in the language of the Act, as, for example, a statement to the effect that the rent agreed to be paid is the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but should require the material circumstances to be set out, and the grounds for the conclusion arrived at stated. In the present case I think that this has been sufficiently done. For these reasons, and also for those given by the Master of the Rolls, I think the appeal should be allowed.

COZENS-HARDY L.J. This appeal raises questions of great importance as to the power of a tenant for life under the Settled Land Act to grant a mining lease. In considering the case I think I am entitled, and indeed bound, to have regard to the policy of the Act as explained by the House of Lords in *Bruce* v. *Marquess of Ailesbury* (1), and not to narrow or cut down the language used in the Act so as to make it conform to decisions given prior to the Act upon powers of leasing conferred by other instruments. A tenant for life may now grant

(1) [1892] A. C. 356.

such a mining lease as is authorized by ss. 6, 7, 9, and 17 of the Act, even though the lease may to some extent prejudice the remaindermen, provided only that the tenant for life does not fail to comply with the provisions of s. 53.

The estate in question comprises about 340 acres of land lying in scattered plots, the coal under which cannot be worked except in conjunction with the coal under the adjoining and intermixed lands. It is proved that the terms of the agreement, to which I must refer more particularly, are such as are usually, or indeed universally, adopted in this particular mining district, and that the rent is the best rent within the meaning of s. 7, sub-s. 2. But it is said that the lease is not authorized, because it reserves a minimum or certain rent, varying from nothing in the first year to 1*l.* per acre in the fifth and succeeding years, and because no special way-leave rent is reserved, although the way-leave may be exercised for many years after the whole of the coal has been won. Byrne J. has held these objections to be valid, but I am unable to accept this view. It is no doubt true that the rent must be the best rent; but s. 9, sub-s. 1 (i.), plainly shews that the rent need not be uniform throughout the term. It may vary according to the quantity of coal got, and cease when all the coal has been got. Sect. 9, sub-s. 1 (ii.), contemplates that there may or may not be a fixed or minimum rent. When once it is established that the rent is the best rent as between lessor and lessee, I can see no reason why the minimum rent, which need not be reserved at all, should not begin at the second year of the term, or why the minimum rent should necessarily be constant when once it has begun. The use of the word "rent" in the case of a mining lease is somewhat misleading. It is really purchase-money for coal worked, and s. 11 provides that a certain proportion of the rent shall be set aside as capital money. In the present case the proportion is two-thirds. There is no objection to the clause which provides that what are called "undergettings" may be made up at any time during the term. Sect. 9, sub-s. 1 (ii.), contemplates this. The minimum rent is not fixed on a descending scale, the effect of

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which might perhaps be that the tenant for life would get an advantage over the remaindermen. On the contrary, there is an ascending scale from the second year to the fifth year. A minimum rent is reserved in order that the lessee may have a strong pecuniary inducement to get the coal with reasonable speed and regularity. It is really a part payment in advance of the purchase-money. And it is not easy to see how the remaindermen can be damnified, inasmuch as their proportion of all money so paid in advance is secured.

Mr. Bristowe, who argued the case with great ability, relied upon the fact that, by s. 4 of the Settled Estates Act, 1877, a peppercorn rent, or any smaller rent than the rent ultimately payable, may be made payable during any part of the first five years in the case of either a building lease or a mining lease, and that though this provision is repeated in s. 8, sub-s. 2, of the Settled Land Act in the case of a building lease, no similar provision is found in s. 9 with reference to a mining lease. I am not impressed by this difficulty. I decline to cut down the Settled Land Act by reference to the Settled Estates Act, which is still in force. I think the Legislature has used language which rendered it unnecessary in the case of a mining lease to insert any such provision.

With reference to the way-leave, it seems to me that s. 17 expressly authorizes the grant in a mining lease of a way-leave during the whole of the term of sixty years. I find nothing requiring a separate rent to be reserved in respect of that way-leave. In short, the mining lease must be looked upon as a whole. The rent or purchase-money is payable for everything comprised in the lease—i.e., for the coal plus the way-leave. This rent or purchase-money may vary according to the acreage worked. The rent will cease when all the coal is won, or, in other words, the whole purchase-money will then have been paid. But the lessee will still be entitled during the continuance of the term to enjoy the property demised.

In my opinion the order of Byrne J., except so far as it provides for costs, should be discharged, and an order made substantially in accordance with the notice of appeal. The

costs of all parties of the appeal should be paid out of capital money.

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The terms of the order made by the Court of Appeal were as follows:—

This Court doth order that the said order dated the 15th January, 1902, be discharged. And this Court doth declare that by virtue of the Settled Land Acts, 1882 to 1890, the applicant as tenant for life under the above-mentioned settlement has power to grant a lease of a seam of coal under the above-mentioned estate for a term of sixty years, reserving a minimum yearly rent not commencing until the second year of the said term, and increasing year by year until the fifth year of the said term. And this Court doth declare that he has power to insert in such lease a proviso for the cesser of the said minimum rent when all the coal demised by the lease, except such parts thereof, if any, as in accordance with the provisions of the said lease are not to be worked or paid for, shall have been paid for at the acreage rate reserved by the said lease. And this Court doth declare that such lease may contain a way-leave for foreign coal to continue after such cesser as aforesaid at a nominal rent.

And it is ordered that the costs of the applicant and of the respondents of the said order and of and occasioned by this appeal be taxed by the taxing master as between solicitor and client; and it is ordered that the same when so taxed be paid and retained out of capital moneys comprised in the said settlement.

Solicitors: *R. F. & C. L. Smith, for Ford & Warren, Leeds.*

W. L. C.

C. A.
1902
May 10, 12, 15.

In re WHITMORE.
WALTERS *v.* HARRISON.

[1901 W. 2024.]

Will—Construction—Gift of Residue to Members of a Class living at Period of Distribution—Direction for Settlement of "the Share" of one of the Class—Death of Legatee before Period of Distribution.

A testatrix, who died in 1854, by her will, made in 1849, directed the income of her residuary estate to be paid to her sisters, S. and C., in equal shares, during their joint lives, or until one of them should marry or die, and after the death or marriage of either, then to the other, during her life, or until she should marry, and after the death or marriage of such surviving or last marrying sister the testatrix directed that, subject to trusts which she declared of a sum of 1000*l.*, her residuary estate should be held in trust for all or such one or more of her brothers and sisters (except her sister E., but including S. and C., if they or either of them should marry) who should be living at the death or marriage of such surviving or last marrying sister, in equal shares, if more than one, as tenants in common. And (after providing for the event of her brothers, or either of them, being dead, or either of her sisters S. and C., having previously married, being dead at the death or marriage of such her surviving or last marrying sister) the testatrix directed that with respect to "the share" of her sister H. "the same share" should be held in trust to pay the income thereof to her during her life, for her separate use, and after her death the capital of "the same share" should be held in trust for her child or children, as she should by deed or will appoint, and in default of appointment in trust for and to vest in her child or all her children, if more than one, being sons at twenty-one, and being daughters at twenty-one or marriage, and if more than one in equal shares.

At the date of the will the testatrix had living three brothers and four sisters, two of whom, S. and C., were unmarried, and the other two, E. and H., were married. S. and C. never married. C. died in 1900, having survived all her brothers and sisters. H. died in 1884. She had had four children, all of whom attained twenty-one; but they all died before C. Neither the brothers nor the sister E. left issue:—

Held, upon the construction of the above clauses, coupled with other parts of the will, that by the expression "the share" of H. was meant an aliquot part of the estate of the testatrix, and not merely the share which H. would have taken if she had survived her sister C., and that, consequently, the representatives of the deceased children of H. were entitled to the residue.

Decision of Byrne J. reversed.

In re Roberts, (1885) 30 Ch. D. 234, *In re Pinhorne*, [1894] 2 Ch. 276, and *In re Powell*, [1900] 2 Ch. 525, considered.

Appeal from the decision of Byrne J. (1)

The question arose upon the construction of the will of Maria Whitmore, a spinster, who died in 1854.

(1) W. N. (1901) 146.

The will was executed in 1849. At the date of its execution there were living three brothers and four sisters of the testatrix. Two of the sisters, Sophia and Catherine, were unmarried; the other two, Elizabeth Saltmarshe and Charlotte Harrison, were married.

By her will the testatrix directed the income of her residuary estate to be paid to her sisters Sophia and Catherine, in equal shares, during their joint lives or until one of them should marry or die, and, after the decease or marriage of either, then to the other, during her life or until she should marry, and, after the death or marriage of such surviving or last marrying sister, the testatrix directed stocks and securities of the value of 1000*l.* to be held upon trust to pay the income to Elizabeth Saltmarshe during her life, and after her death the capital was to be held on trust for and to vest in Ellen Catherine Whitmore, on her attaining twenty-one or on her marriage. Subject to these provisions, the testatrix directed her residuary estate to be held in trust for all or such one or more of her brothers and sisters (except Elizabeth, but including Sophia and Catherine, if they or either of them should marry) who should be living at the decease or marriage of such surviving or last marrying sister, in equal shares, if more than one, as tenants in common and not as joint tenants. Then followed this proviso: "Provided always and I hereby direct that, if, at the death or marriage of such my surviving or last marrying sister as aforesaid, my brothers William, George, and James, or any or either of them, shall be dead, or either of my sisters Sophia and Catherine shall be dead having previously married, and there shall be living any child or children of any one or more of them so dying who shall then have attained or shall afterwards attain the age of twenty-one years, or who shall then have married or shall afterwards marry, such child or children shall together and per stirpes have and be entitled to such part or share of my said trust estates and funds as his, her, or their parent, or respective parents, would have had or been entitled to, if such parent or parents had been then living. And I declare and direct that, with respect to the share of my said sister Charlotte Harrison of and in my said trust estates and funds, the same

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share shall be held in trust to pay the income thereof to her during her life, for her separate inalienable use, and after her decease the capital of the same share shall be held in trust for such one or more exclusively of the other or others of her children, and if more than one in such shares and subject to such conditions and restrictions and in such manner as the said Charlotte Harrison, notwithstanding her coverture, shall by any deed or deeds, or by her last will direct or appoint; and, in default of any such direction or appointment, or so far as any such direction or appointment, if incomplete, shall not extend, in trust for and to vest in the child, if only one, or all the children, if more than one, of the said Charlotte Harrison, who, being a son or sons, shall have attained or shall attain the age of twenty-one years or die under that age leaving issue living at his death or at their respective deaths, and who, being a daughter or daughters, shall have attained or shall attain that age or shall have married or shall marry under that age, and, if more than one, in equal shares; and in the event of no son of my said last-named sister living to attain the said age or dying under that age leaving issue living at his death, and no daughter living to attain that age or to be married under such age, I direct that the same share shall be held in trust for the same persons as shall be entitled to the other share or shares of my said trust estates and funds and in the same proportions."

Neither of the sisters Sophia and Catherine married. Catherine died in 1900, having survived all her brothers and sisters. Charlotte Harrison died in 1884. She had had four children, all of whom attained twenty-one, but they all died before Catherine and without issue. Neither of the brothers of the testatrix nor her sister Elizabeth Saltmarshe left any issue.

Byrne J. held that, as Charlotte Harrison did not survive the period of distribution, she did not take any "share" in the trust fund, and that, consequently, her children and their representatives could take nothing, but there was an intestacy. In so deciding, the learned judge followed *In re Roberts* (1), and distinguished *In re Pinhorne* (2) and *In re Powell.* (3)

(1) 30 Ch. D. 234. (2) [1894] 2 Ch. 276. (3) [1900] 2 Ch. 525.

The representatives of the deceased children of Charlotte Harrison appealed.

Levett, K.C., and *Leverson*, for the appellants. There is nothing in the will which makes it necessary that the children of Charlotte Harrison should survive the period of distribution in order that they should take. Her "share" is dealt with in a different way from the shares of the other brothers and sisters of the testatrix. She was the only sister who had children, and her share is treated as a family share. The cases which were relied upon for the respondents do not apply. They related to lapse by reason of death before the testator. A legatee who has died before a testator never had anything but a spes successionis. Here Charlotte had a contingent share immediately after the death of the testatrix.

Younger, K.C., and *Hon. F. Russell*, for the next of kin of the testatrix. The settlement made by the will upon Charlotte and her children is not a settlement of a share or aliquot part of the estate of the testatrix; it is only a settlement of the share which Charlotte takes; and she took nothing, because she did not survive the period of distribution. It was necessary that she should be alive at that time to receive the share.

[COZENS-HARDY L.J. You must contend that, even if all Charlotte's four children had been living at the death of Catherine, they would have taken nothing, because their mother had died before Catherine.]

No doubt that is so. But on the other construction the only persons who take are the representatives of Charlotte's children. On either construction there is an absurd result. *In re Roberts* (1) is almost exactly on all fours with the present case. Indeed, the present case is even stronger. In *In re Roberts* (1) the gift was to named persons; here it is a class gift. *In re Pinhorne* (2) and *In re Powell* (3) are both distinguishable.

P. M. Walters, for the trustees of the will.

Levett, K.C., in reply. *In re Roberts* (1) is distinguishable. In that case the gift over was prior to the settlement. The

(1) 30 Ch. D. 234. (2) [1894] 2 Ch. 276.
(3) [1900] 2 Ch. 525.

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present case is governed by *In re Pinhorne* (1) and *In re Powell.* (2)

Cur. adv. vult.

May 15. STIRLING L.J. read the following judgment of the Court (Collins M.R. and Stirling and Cozens-Hardy L.JJ.) :— The question in this case arises on the construction of the will of Maria Whitmore—namely, what is the meaning of the words "the share" in a clause to be presently examined. To assist us in answering this question we were referred to three cases, *In re Roberts* (3), *In re Pinhorne* (1), and *In re Powell* (2), in all of which the same two words had to be construed. The first is binding on us, and we see no reason to doubt that the two latter were well decided. But the wills which were the subject of adjudication in all of them differed substantially from that with which we have to deal, and in these circumstances the decisions afford little assistance, except so far as they lay down a rule or principle. We can find none laid down except this, that the words in question are susceptible of more than one meaning, and that in ascertaining the sense in which they are used the whole will must be regarded. It may be well, however, before proceeding further to recall one rule of construction—namely, that which was laid down by Lord Cranworth in *Abbott* v. *Middleton* (4), and was approved by Lord Cairns L.C. in *Bathurst* v. *Errington* (5) : "Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and

(1) [1894] 2 Ch. 276.
(2) [1900] 2 Ch. 525.
(3) 30 Ch. D. 234.
(4) (1858) 7 H. L. C. 68, 89.
(5) (1877) 2 App. Cas. 698, 709.

unreasonable." [His Lordship then stated the provisions of the will and the events which had happened, and continued:—]

It is to be observed that the brothers and sisters named in the earlier clause of the proviso constitute the primary objects of the bounty of the testatrix, in this sense, that they are to take their shares absolutely, if they survive the period of distribution, while their children are only secondary objects of bounty, in the sense that they take nothing unless their parents die before the period of distribution.

Then follows the clause relating to the share of Charlotte, which gives rise to the question which we have to decide.

The present contest lies between the legal personal representatives of the four children of Charlotte, and the next of kin of the testatrix. For the former it is contended that, by the words "the share" of Charlotte, is meant an aliquot share of the estate destined by the testatrix for Charlotte and her children; for the latter, that the share intended is that which under the prior gift would have come to Charlotte, if she had survived Catherine.

Now it is obvious that the dispositions in favour of Charlotte and her children differ entirely from those in favour of the other brothers and sisters. Charlotte takes a life interest only; her children take interests in remainder, which vest in the case of sons on their attaining twenty-one or dying under that age leaving issue living at their respective deaths, and in the case of daughters on their attaining twenty-one or marrying. The interests given to the children of Charlotte do not in any way depend on their surviving the period of distribution. The children are no longer secondary, but they are primary, objects of bounty.

It is said that "the share of my said sister Charlotte" means "the share to which my said sister Charlotte will be entitled in the event of her being living at the period of distribution." That is not, however, the language of the testatrix, though she had used such language in the immediate context where she speaks of "such . . . . share . . . . as his, her or their parent, or respective parents, would have had or been entitled to, if living." The words are, no doubt, susceptible of that meaning, but they

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are also susceptible of another, namely, that which is contended for on behalf of the legal personal representatives of the four children of Charlotte. In determining which is to be preferred, we are entitled to look at the consequences of the different interpretations. Now, if "the share" means only that which Charlotte would take in the event of her surviving the period of distribution, this result would follow—that, if Charlotte had died before that period leaving four children, who all attained twenty-one and survived the period, not one of them would have taken anything. That is, the children of Charlotte, who were primary objects of the bounty of the testatrix, would have been in a less favourable position than the children of the other brothers and sisters, who were only secondarily objects of bounty. We think that this cannot have been intended: the consequence appears to us to be so capricious and anomalous as to call for a different interpretation. It was said that the actual result is no less anomalous—namely, that the whole estate goes to children of a sister none of whom survived the period of distribution, whereas the general intent of the testatrix was that survivorship should be a condition necessary to sharing in the estate. We think, however, that this argument ought not to prevail, as the language of the will with respect to the conditions under which the children of Charlotte take vested interests is clear and unambiguous.

We are conscious that the question which we have to decide is one of difficulty, and we regret that it is our misfortune to differ from so accurate and careful a judge as Byrne J. But, on the best consideration we can give, we think that the appeal ought to be allowed.

Solicitors: *Upton, Atkey & Co.; Hon. Charles Russell; Walters & Co.*

W. L. C.

In re LONDON AND NORTHERN BANK, LIMITED.

HADDOCK'S CASE.
HOYLE'S CASE.

[00408 and 00410 of 1899.]

C. A.
1902
BYRNE J.
Feb. 7;
March 6.
C. A.
April 23.

Company—Winding-up—Private Examination—Attendance of Solicitor—Undertaking not to Disclose—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

The examination of witnesses in the winding-up of a company under s. 115 of the Companies Act, 1862, is a private proceeding; therefore, where a witness directed to be examined under this section was attended by a solicitor who also represented a third party against whom an action by the company was pending:—

Held, that the registrar might exact from the solicitor, as the condition of his being allowed to be present at the examination, an undertaking not to disclose to any one without the leave of the Court any information he might acquire at the examination.

MOTION.

This was an application by the liquidator of the London and Northern Bank, Limited, with reference to a ruling of Mr. Registrar Hood in the examination before him of a witness under s. 115 of the Companies Act, 1862, which raised the question of the right of the registrar, or other the person conducting the examination under this section, to require an undertaking from the solicitor of the witness not to communicate any part of the evidence, or any information obtained during the examination, to any other person, or use it for any purpose except for the re-examination of the particular witness. There was also a further question as to a solicitor's right to claim privilege. The facts were as follows:—

The London and Northern Bank, Limited, before going into voluntary liquidation, commenced an action against George Newnes, Limited, claiming 90,000*l.* damages for libel contained in a paragraph to the effect that the bank was in liquidation, for which George Newnes, Limited, were alleged to be responsible. Shortly afterwards the bank passed resolutions for a voluntary winding-up.

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In the course of the examination of one J. H. Archer, an ex-manager of the bank, by the liquidator under s. 115 of the Companies Act, 1862, it transpired that certain documents belonging to the bank were in the possession of George Newnes, Limited; the liquidator then desired to examine certain other persons with a view of discovering further facts, either about these documents or others, for the purposes of the liquidation, and he obtained an order for the private examination, under s. 115, of a Mr. Haddock, for some time secretary of the bank, and Mr. Hoyle, solicitor to George Newnes, Limited. At the examination of Mr. Haddock, counsel on behalf of the liquidator applied that Mr. Hoyle, the solicitor for the witness, should not be present during the examination, on the ground that he also was summoned as a witness in the matter; and Mr. Hoyle accordingly withdrew. Counsel for the liquidator then asked that Mr. Hoyle's managing clerk, an admitted solicitor, should also withdraw. Counsel for Mr. Haddock objected, when the registrar stated that he would only allow Mr. Hoyle's managing clerk to attend on condition that he treated the matter as entirely private, and only used the information obtained from questions put to the witness for the purposes of re-examination, not communicating any part of the information thus obtained to any other person or persons whatsoever except his counsel, and he required an undertaking in these terms to be given. Counsel for Mr. Haddock objected to any limitation of this kind being imposed, and, as the registrar declined to allow the managing clerk to be present without an undertaking, and the witness was advised to refuse to answer any question in the absence of his solicitor, the matter was referred to the judge for his consideration.

The further facts as to Hoyle's case were as follows: In the course of the examination of Mr. Hoyle as to certain documents belonging to the bank which he had in his possession, he was asked, "From whom did you receive these documents?" This question Mr. Hoyle declined to answer, claiming the privilege of a solicitor; and on this point he was supported by the registrar. The liquidator now moved to discharge this ruling, and both questions came on together for argument.

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The motion was heard before Byrne J. on February 7, 1902.

Tindal Atkinson, K.C., and *Stewart-Smith*, for the liquidator. Examinations under s. 115 are in the nature of a secret proceeding: *In re Greys Brewery Co.* (1); and though the witness is entitled to have a solicitor present during his examination, still the solicitor may only use information acquired during this time for purposes of re-examination: *In re Cambrian Mining Co.* (2); and the registrar was quite right in the circumstances of this case to require an undertaking from this solicitor. A somewhat similar direction seems to have been made in *In re London and Lancashire Paper Mills Co.* (3)

Muir Mackenzie, and *Montague Lush*, for Haddock. The witness has a right to have a solicitor present, he has a right to choose his own solicitor, and under the special circumstances of this case he is entitled to be represented by Hoyle or his managing clerk; the registrar had no right to impose any undertaking on this solicitor before allowing him to be present. The solicitor is entitled to be present and to take notes of the proceedings for the due protection of his client: *In re Breech-loading Armoury Co.* (4) To do otherwise is to give a most unfair advantage to the liquidator.

Tindal Atkinson, K.C., in reply, referred to the Companies Winding-up Rule, November, 1895, and *In re Norwich Equitable Fire Insurance Co.* (5)

[The following cases were cited with reference to Hoyle's claim of privilege: *Reg.* v. *Cox* (6), *Williams* v. *Quebrada Railway, Land and Copper Co.* (7), and *In re North Australian Territory Co.* (8)]

Cur. adv. vult.

March 6. BYRNE J. This is, in effect, an application by the liquidator of the company to overrule what has been done by the registrar with reference to the solicitor of a witness who

(1) (1883) 25 Ch. D. 400.
(2) (1881) 20 Ch. D. 376.
(3) W. N. (1888) 63.
(4) (1867) L. R. 4 Eq. 453.
(5) (1884) 27 Ch. D. 515.
(6) (1884) 14 Q. B. D. 153.
(7) [1895] 2 Ch. 751.
(8) (1890) 45 Ch. D. 87.

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was being examined under s. 115 of the Companies Act, 1862. I need not refer to the authorities which have been cited, except, perhaps, *In re Greys Brewery Co.* (1), where the nature of examinations of this kind is thoroughly dealt with, to shew how much an examination under s. 115 differs from anything in the nature of a public examination; an examination under s. 115 is entirely private, and has many times been recognised to be so by the Court. The Companies Winding-up Rule of November, 1895, provides that the notes of the deposition of a person examined under s. 115, or any order of the Court, before the Court, or before any officer of the Court, or person appointed to take such an examination, shall not be placed on the file of proceedings, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the Court shall so direct; and the Court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes, and the furnishing of copies of and extracts therefrom. That goes to emphasise the importance of secrecy in these proceedings, except where the seal of secrecy is removed for particular purposes. [After shortly stating the facts and the ruling of the registrar, his Lordship continued :—]

Now, it has been argued on behalf of Mr. Haddock that, inasmuch as the party who is being examined under s. 115 has a right to be represented by counsel and solicitor, and inasmuch as any one entitled to employ a solicitor is also entitled to chose his own solicitor, therefore—so I understood the argument—a witness is entitled to say, "I will be represented by a solicitor, and I will be represented by this particular solicitor; I am entitled to have him present, and no other." In my opinion that is putting the rights of a witness under this section a great deal too high. It is true that it has been admitted that a witness has a right to be represented by counsel and solicitor for certain purposes; but it has never, so far as I know, been decided that a witness at an examination of this private character is entitled to be represented by a solicitor who is also the solicitor to a hostile defendant in a litigation pending by

(1) 25 Ch. D. 400.

the liquidator, and who also declines to give any undertaking not to use the information so obtained for other purposes.

There is an old authority which, though decided under the bankruptcy jurisdiction, throws some light on the present case, though I believe at that time it was not considered that a party had a right to be represented at all by counsel or solicitor: it is the case of *In re Towsey*. (1) In that case counsel for the assignee applied to the Court for directions under these circumstances: A private examination was going on relative to the estate of the bankrupt; the same solicitor who had appeared for the bankrupt on the previous day now appeared for a witness under examination, and was instructing his counsel; that solicitor had refused to leave the room; the commissioner was therefore asked to order him to retire. Mr. Commissioner Goulburn in giving judgment said: "If the Court appoint a private sitting, and it sees good reason to apprehend that the object of that meeting may be defeated by the presence of a gentleman who is both solicitor for the bankrupt and for the witness, it may order such person to withdraw."

According to the practice in the registrar's office up to the present time, this is the first occasion, so I am told, that an objection has been made by the solicitor of a witness to give an undertaking of the kind required in this case. It has not been the practice of the registrar to order a particular solicitor, or a particular solicitor's clerk, to leave the room if he is willing to give an undertaking similar to the one required in this case; but I think the registrar is justified, if the solicitor refuses to give the required undertaking, in directing the solicitor to leave the room, though no doubt he would give the witness under examination an opportunity of instructing another solicitor if he desired to do so. I am, therefore, of opinion that the registrar was right on this occasion, and I uphold what he has done.

[The order of the Court was (so far as material) as follows:—

This Court doth order that the said John Daniel Haddock do at his own expense attend before the registrar (at the time and place therein mentioned)

(1) (1863) 9 L. T. 613.

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for the purpose of being further examined and of answering all questions that the said registrar may allow to be put to him on behalf of the said liquidator. And it is ordered that the said George Hardman Hoyle is not to be allowed to be present at such further examination. And it is ordered that on any such further examination the registrar may require the managing or other clerk of the said George Hardman Hoyle either to withdraw from such examination or to give his undertaking to the registrar to use any information he may acquire at such examination for the purpose only of the re-examination of the said John Daniel Haddock, and not to disclose or allow to be disclosed to any one without the leave of the Court any information he may so acquire, and at the close of such examination to forthwith destroy all notes taken by him at such examination. But the said managing or other clerk of the said George Hardman Hoyle is to be at liberty to disclose to the said George Hardman Hoyle upon the said George Hardman Hoyle first giving a similar undertaking to the said registrar.]

With reference to Mr. Hoyle's case: the cases that have been referred to in the argument, that privilege cannot be claimed where an issue of fraud is raised in which the solicitor himself is charged with being a party, appear to me to have no bearing upon the present case. All that has happened in the present case is, that certain documents which ought to have been in the possession of the bank are in the possession of some one else, and apparently by reason of the breach of faith of some of the servants of the bank; but up to the present there is nothing more in it, and I do not see that there has been anything to deprive Mr. Hoyle of his right to claim privilege, which, in my opinion, was properly claimed, and this motion, therefore, fails.

Leave to appeal was granted to both parties.

W. C. D.

C. A. Haddock appealed from the first part of this judgment. There was no appeal by the liquidator as to the second part. The appeal was heard on April 23, 1902.

Montague Lush, K.C., and *Muir Mackenzie*, for Haddock. A witness examined under s. 115 of the Companies Act, 1862, is entitled to be attended by a solicitor and to select the solicitor who is best able to protect him, and the solicitor ought not to be required to give an undertaking which will make it impossible for him to act. The order for this examina-

tion has been obtained by the liquidator for the purposes of the action against George Newnes & Co., and justice can only be done in the libel action if each side is allowed to get at the truth and to use the information which he has. The Court has a discretion to make this examination public, and in the interests of justice the Court ought to exercise its discretion in this case.

Tindal Atkinson, K.C., and *Stewart-Smith, K.C.*, for the liquidator.

COLLINS M.R. This is an appeal from a decision of Byrne J. affirming the course taken by the registrar upon an examination under s. 115 of the Companies Act, 1862. [His Lordship stated the facts, and continued:—]

The ground of appeal is that the undertaking exacted by the registrar from Mr. Hoyle's managing clerk as the condition upon which alone he should be allowed to be present at the examination of the appellant is an undertaking which ought not to be enforced. It is said that it is impossible for the appellant to be adequately protected by anybody but this particular firm, who are the firm of solicitors acting for George Newnes & Co. in a litigation between the liquidator and them, and that it is practically impossible for any other solicitor to be so conversant with all the facts necessary to protect this witness in the examination, and that, therefore, if the witness is to be protected at all, he ought to be protected by George Newnes & Co.'s solicitor, and not by an independent solicitor. On the other hand, the registrar made no objection to the witness being protected and advised by a totally independent solicitor. No doubt it does place this particular solicitor and his managing clerk in a difficulty, if they are to carry on at the same time the litigation of Newnes & Co. and to protect this witness without allowing what they have heard in one capacity to affect their conduct in the other. However, the right of the witness to be protected on this inquiry has absolutely no relation to the rights of Newnes & Co. in this litigation; and if the two cannot be reconciled when the same solicitor is the chosen representative of the witness, the

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witness must dispense with the assistance of that solicitor. That is the net result of it.

This proceeding is a private examination which the Court sanctions in order that the liquidator may obtain the necessary information to enable him to proceed in the winding-up, and for many reasons it is most undesirable that the opposing party in the litigation contemplated by the liquidator should be allowed to be present at a proceeding which is essentially a proceeding for the purpose of informing the officer of the Court, and the Court, what course ought to be pursued. It is not as though it were absolutely and finally a sealed book to which the opposing litigant can never get access, because there is machinery whereby the Court can allow the result of this examination, if in its discretion it thinks proper, to be disclosed so far as necessary. That is to be found in the rule which is called the Companies Winding-up Rule of November, 1895. That rule provides as follows: "(1.) Notwithstanding anything contained in the Companies Winding-up Rules, 1890–1892, the notes of the depositions of a person examined under s. 115 of the Companies Act, 1862, or under any order of the Court, or before any officer of the Court, or person appointed to take such an examination (other than the notes of the depositions of a person examined at a public examination under s. 8 of the Companies (Winding-up) Act, 1890), shall not be placed on the file of proceedings, or be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the Court shall so direct, and the Court may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes, and the furnishing of copies of or extracts therefrom." So that it is not as if George Newnes & Co. in this case are necessarily shut out from learning anything which takes place on this examination, if they can shew that it might be really material to their litigation and that they have a right to see it. If they can establish those two propositions, the rule which I have read provides machinery by which, in a proper case, they could get at what occurred in this examination.

The broad question before us here is whether in the circumstances of this case George Newnes & Co.—because that is the substance of the matter—have any reason whatever to intervene and complain that the registrar has exacted as a condition of the witness being represented by this particular solicitor that the solicitor should undertake to safeguard, what is essential to this procedure, the privacy of this examination. It is not a public examination, and it is not intended to be a public examination, and the whole purpose of it might be defeated if the public—in this case an opposing litigant—were allowed to be present. As I have pointed out, there is machinery which is capable of being used to prevent any unfair advantage being taken by information being obtained by the liquidator which might be very material to the litigant against whom he contemplates, or is actually engaging in, litigation. In the proper circumstances, under proper conditions and with proper safeguards, there is no doubt that access may be had to that information.

The point is here whether, in an examination under s. 115, ipso facto the solicitor who attends to protect a witness is entitled to be present and to disclose to any one the information which is obtained in a private room, at a private hearing, before the officer of the Court. It seems to me that the order of Byrne J. affirming the order of the registrar was perfectly right, and that we should not be justified in disturbing it. The order itself meets any difficulty which might arise in the matter, because it says that the managing clerk must give an undertaking to the registrar not to disclose, or allow to be disclosed, to any one "without the leave of the Court" any information he may so acquire; so that the Court retains a discretion over the result of the examination; and if a proper case were made, I have no doubt the Court would see its way to assist any party who had a right to know what took place there.

For these reasons I think that this appeal must be dismissed.

STIRLING L.J. I am of the same opinion. The Legislature, by s. 115 of the Companies Act, 1862, has conferred on the

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Court the power of summoning persons before it who can give information concerning "the trade, dealings, estate, or effects of the company." It was established very many years ago that upon such occasions it was right that the person summoned before the Court should have the assistance of counsel and solicitor if he desired it. The examinations which take place under this section have for a long period—in fact, so far as I know, from the very passing of the Act of 1862—been always treated as private in the first place. Of course, a private examination is open to abuse, and the procedure under the section ought to be carefully watched to see that the process is not abused. In order that this may be done, before an order is made, the sanction of the registrar is required. The liquidator must disclose to the registrar what object he has in seeking this information; and the registrar upon that exercises his discretion whether it is right and proper that an order for such an examination should be made.

In the present case, so far as I can see, the registrar has properly exercised his discretion with reference to this examination. There has been nothing produced to shew that he has acted in any way improperly or on any improper grounds, and he has satisfied himself that it is desirable that Mr. Haddock should be examined with reference to the trade, dealings, estate, or effects of the company—what in particular we do not know. Mr. Haddock was a former officer of the company, and presumably he knows something about some of the matters which are referred to in the section. Upon appearing before the registrar, Mr. Haddock was represented by counsel and solicitors who happened to be the counsel and solicitors of George Newnes & Co., who are at the present moment in litigation with the liquidator, and doubtless one may infer from what has taken place that the object of the examination is in some way connected with that litigation. Here, again, the registrar knows all the facts of the case, and he was of opinion evidently that this was a matter as to which it would not be proper that George Newnes & Co. should be present: they have no right, according to the rule of the Court, to be present, and it might defeat the object of the examination if they were

present. Then he is met by this difficulty, that the counsel and solicitors who appear for the witness are the counsel and solicitors of George Newnes & Co., and that they may disclose the proceedings in the examination to George Newnes & Co.—that is, they may for the purpose of the litigation use the information which is extracted in the course of the examination. To prevent that, which would bring about exactly the same result as if George Newnes & Co. were themselves present in person, he has imposed certain undertakings upon the solicitors and counsel, and the question is whether he is justified in so doing.

It seems to me, in the present state of our information, that he was entirely justified, for the reasons given by Byrne J., and that we ought not to disturb the order. At the same time, I think it would be the duty of the registrar, in further prosecuting this examination, to take great care that it is not abused. The abuse which has been suggested is this. It appears that there is a great controversy going on between the liquidator and George Newnes & Co. with reference to the production of documents, and it is said that many documents have been withheld by the liquidator from discovery in the action which is now pending between the company in winding-up and George Newnes & Co. I should be sorry to suppose that there was any real foundation for such a charge against the officer of the Court who is conducting this litigation. But no doubt there is the possibility that some difficulty may have occurred.

Now it is said on behalf of George Newnes & Co. that they ought to be enabled, if a document is produced or made use of in this examination, to bring that forward in any future proceedings for discovery, so that, in case a document is produced which is not embraced in any affidavit which has hitherto been made, they may be able to make use of it for the purpose of getting a further and better affidavit of documents. If there is established such conduct on the part of the liquidator as is alleged, I should be willing enough to help them.

But are they shut out from that? I cannot see that they are. At the present time we know nothing of what is going to happen in this examination of Mr. Haddock. Not a single question has been asked of him, and we do not know to what

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precisely the examination is to be directed. The registrar will in the ordinary course take a full note of the evidence, and that note will be preserved; and if it occurs to George Newnes & Co. or their advisers that they may properly ask for the disclosure of any part of it, or may desire to know what documents were produced or any documents produced in the course of it, for any proper or legitimate purpose, it seems to me that it is open to them, either under the leave reserved by the order itself, or under the jurisdiction conferred by the Winding-up Rule, 1895, to make an application to the Court for the disclosure of part or the whole, as they may think fit, of this deposition; and upon any such application the Court will be far better able to judge of the propriety of allowing disclosure than it can be in the present stage.

In these circumstances it seems to me that the order ought not to be disturbed.

COZENS-HARDY L.J. I agree. It must be recognised that the Legislature has put the liquidator, after a company has been wound up, in a position in some respects more favourable than that of any other litigant. The Court has given him power—not an absolute power, but subject to the control of the Court itself—to summon before itself any person known or suspected to have in his possession any estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem to be capable of giving information concerning the trade, dealings, or effects of the company.

That is a power which is not an absolute power in the liquidator. An order of the Court has to be obtained and the examination takes place before the registrar, himself an officer of the Court.

By the rules of 1892 (rule 3 (2.)) it is expressly enacted that these examinations of persons summoned before the High Court under s. 115 shall, unless the judge of the High Court shall otherwise direct, be held before the registrar in chambers —that is to say, they shall be held in a place to which the public have no right of access. Such an examination may be

held, not merely with a view to future litigation, but with a view to assisting the liquidator in litigation which has been already commenced.

When that is once admitted, it seems to me that it would be impossible to suppose that the Court would allow the very end and object of the order which it has made for the examination of a witness to be defeated by permitting the opposite party to the litigation to be present. This information is information of a confidential nature, and, since the rule of 1895, it is not to be put on the file, and it is not open to any member of the public, or even to the witness himself, without some order of the Court.

Regarding this application as I do, as in substance an application by George Newnes & Co., the defendants to the libel action, to be present at the examination of this witness, I think that it is wholly wrong, and that the view taken by the registrar and by Byrne J. is quite correct.

Solicitors: *Helder, Roberts, Walton & Thomas, for Simpson & Simpson, Leeds; G. H. Hoyle.*

H. B. H.

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April 26, 28.

In re CRICHTON'S OIL COMPANY.

[0098 of 1901.]

Company—Winding-up—"Surplus Assets"—Loss of Capital—Profits earned before Winding-up—Dividend not declared—Rights of Preference and Ordinary Shareholders inter se.

The capital of a trading company consisted of 10*l.* shares, preference and ordinary, all paid up in full, the former being entitled to a cumulative preferential dividend. The articles of association empowered the directors to set aside out of the profits such sums as they thought proper as a reserve fund. For some years the preferential dividend was paid, and then for three years the business was carried on at a loss, the result being a loss of capital to the amount of 4346*l.* In the next year there was a profit of 1675*l.* on the year's trading, but the directors did not declare a dividend or make any appropriation of that sum. The company went into voluntary liquidation, the debts were all paid, and the capital, to the extent of 7*l.* per share, was returned to the shareholders. The sum of 1675*l.* remained in the hands of the liquidator:—

Held, upon the construction of the articles, that the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital rateably among all the shareholders.

Decision of Wright J., [1901] 2 Ch. 184, affirmed.

In re Bridgewater Navigation Co., [1891] 1 Ch. 155, and *Bishop* v. *Smyrna and Cassaba Ry. Co.*, [1895] 2 Ch. 265, considered and distinguished.

APPEAL from the decision of Wright J. (1)

Crichton's Oil Company, Limited, was registered under the Companies Acts, 1862 to 1886, on March 21, 1889.

By clause 5 of its memorandum of association, "The capital of the company is 40,000*l.*, divided into 400 preference shares of 10*l.* each, and 3600 ordinary shares of 10*l.* each. The said preference shares shall confer on the holders the right to a fixed accumulative preferential dividend, at the rate of 5*l.* per cent. per annum, on the capital paid up thereon, subject to the provisions of the company's articles of association; and any new capital may be issued with any preferential, deferred, or special rights and privileges which may be assigned thereto, by

(1) [1901] 2 Ch. 184.

or in accordance with the regulations of the company for the time being."

Clause 6 of the articles of association provided—(*a*) that the owners of the preference shares for the time being should "be entitled to a cumulative preferential dividend at the rate of 5*l.* per cent. per annum, payable half-yearly on the 1st of September and the 1st of March." (*b*) "Provided always that, in the event of the winding-up of the company, the surplus assets . . . . shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon; provided always that if the cause of winding-up, within a period of five years from March 1, 1889, shall be the inability of the company to carry on its business at a profit, the preference shares shall only rank for any surplus after the amount paid up on the ordinary shares has been returned in full to the holders of the said ordinary shares, and after the holders of the preference shares have been paid in full the amount credited as paid up thereon, then the ordinary and preference shares shall rank pari passu for any further surplus."

By clause 103, "The directors shall be intrusted with the following powers, namely, power (inter alia) . . . . (14) from time to time to set aside out of the profits of the company, or otherwise, such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, for redeeming debenture stock, and for such other purposes as the directors shall, in their absolute discretion, think conducive to the interests of the company, and to invest the several sums so set aside upon such investments as they think fit, subject to clause 4 hereof" (forbidding the purchase by the company of its own shares), "and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, with full power to employ the assets for the time being constituting the reserve fund in the business of the company, and that without being obliged to keep the same separate from the other assets

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of the company. But so much only of the reserve fund as represents profits shall be applicable to the payment of dividends."

"108. The profits of the company from time to time available for dividends shall, subject to the provisions hereinbefore contained, be applicable, First, to the payment of the fixed cumulative preferential dividend on the preference shares in the original capital. Secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with, as the directors with the sanction of the company in general meeting may from time to time determine."

"110. The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment.

"111. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

"112. No dividend shall be payable except out of the profits arising from the business of the company. . . .

"113. The directors may from time to time pay such monthly or other interim dividends as in their judgment the position of the company justifies. . . ."

"139. If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall, subject to clause 6, section *b*, be distributed so that, as nearly as may be, the losses shall be borne by contributories in proportion to the capital paid up, or which ought to have been paid up, on the shares in respect of which they are contributories at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

All the preference shares and 1804 of the ordinary shares were issued and were fully paid up. The 5 per cent. dividend on the preference shares was duly paid up to February 28, 1896, after which date no dividend was paid.

On March 31, 1899, there was a debit balance on profit and loss account of 4346*l.* 3*s.*, as appeared by the profit and loss account and the balance-sheet of that date. This was the last balance-sheet made out before the company went into voluntary liquidation, and it and the profit and loss account were unanimously adopted at the ordinary general meeting held on August 9, 1899.

At an extraordinary meeting held on June 7, 1900, the shareholders were informed that negotiations had taken place as to a sale of the company's assets, and a resolution was passed "that the board be authorized to realize the whole of the assets of the company on the basis of a payment to each of the shareholders, preference and ordinary, of a sum equal to 7*l.* per share." This resolution was subsequently confirmed.

An arrangement was accordingly entered into, through the solicitors of the company, the terms of which were embodied in the draft of an agreement between the company and a trustee on behalf of another company intended to be formed, providing that the company should sell to the intended company all its undertaking and assets "as of the 31st March—1st April, 1900, except" (amongst other things) "any undivided net profits of the business of the vendor company appearing in the balance-sheet for the year ending March 31, 1900." The amount of the net profits was not stated, but the draft agreement provided that "The purchasing company shall be entitled to receive, get in, and collect the net profits," and other things, "excepted as aforesaid out of the sale, and shall (as soon as conveniently may be after the balance-sheet of the vendor company as at the 31st March, 1900, shall have been finally settled and audited on the same basis as the previous balance-sheets by Messrs. Monkhouse, Goddard & Co.)"—the auditors of the vendor company—"return to the vendor company, as representing and in lieu of the said excepted profits, such sum as shall appear by such certified and audited balance-sheet to be the amount of the aforesaid undivided net profits of the vendor company." The draft further provided that the consideration for the sale should be the sum of 15,428*l.*, or such less sum as should "appear by the balance-sheet of the vendor

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company as of the 31st March, 1900, when settled and audited as aforesaid, to be the net value of the property and assets of the vendor company, after deducting therefrom the liabilities of the vendor company and any undivided net profits of the business of the vendor company appearing upon the balance-sheet for the year ending the 31st March, 1900," but adding thereto a sum of 334*l.* 3*s.*

On July 23, 1900, the shareholders of the vendor company passed resolutions that the agreement (then unexecuted) should be confirmed, and that the common seal of the company should be affixed thereto; and at a second meeting held on the same day the company passed a resolution for voluntary winding-up. The agreement was executed on August 3, 1900. A further profit and loss account and balance-sheet were prepared by the auditors and certified by them on August 7, 1900. This profit and loss account shewed the profit on the year ending March 31, 1900, to be the sum of 1675*l.* 6*s.* 11*d.* The same amount was shewn on the credit side of the balance-sheet, and was there deducted from the loss of 4346*l.* 3*s.* above mentioned.

The resolution for voluntary winding-up was confirmed as a special resolution on August 8, 1900.

The purchase having been completed, the preference shareholders claimed that the 1675*l.* 6*s.* 11*d.* should be employed in paying dividend on the preference shares as from February 28, 1896.

The ordinary shareholders claimed that this sum should be divided rateably among all the shareholders.

The liquidator took out a summons for the determination of this question by the Court.

Wright J. held that the 1675*l.* 6*s.* 11*d.* must be distributed in the manner claimed by the ordinary shareholders.

The preference shareholders appealed.

Dunham, for the preference shareholders. There can be no "surplus assets" within the meaning of clauses 6 and 139 of the articles until the rights of the two classes of shareholders have been adjusted inter se. Whatever the ordinary meaning

of that term may be, it does not in these articles mean simply the surplus after the creditors have been satisfied, and the costs of the liquidation paid. By the constitution of the company the preference shareholders are entitled—that is, they have a right—to a cumulative preferential dividend out of profits. It is true that dividend in the proper sense of the word cannot be paid now, but there is no reason why this sum of 1675*l.*, which represents profits earned in the last year of the company's existence, should not be applied now in accordance with the contract with the preference shareholders. It is true that the directors could, if they had thought fit, have carried the whole of the amount to a reserve fund, but, if they did not do so, the preference shareholders would have been entitled to it as dividend for the four years in which they had received none. The directors cannot now exercise their discretion, and the mere fact that no declaration of dividend had been made before the winding-up can make no difference: *In re Bridgewater Navigation Co.* (1); *Birch* v. *Cropper.* (2)

It is submitted that the true proposition is this—when at the commencement of the winding-up of a company there is existing a sum of undivided profits, which has not been allocated in any other way, that sum remains profits, and must be applied as such after the winding-up, all the debts of the company and the costs of winding-up having been discharged. This is in accordance with the decision of Kekewich J. in *Bishop* v. *Smyrna and Cassaba Ry. Co.* (3) The proviso at the end of clause 139 preserves the rights of the preference shareholders, whatever they may be. "Surplus assets" in that clause means surplus assets available for capital purposes —that which remains after satisfying all outside claims and the claims of the preference shareholders. This sum of 1675*l.* is not available for capital purposes. The preference shareholders have a higher right than the ordinary shareholders; they are entitled at once to their preferential cumulative dividend out of profits, subject to the power of the directors to set aside a reserve fund out of profits. If the directors do not exercise

(1) [1891] 1 Ch. 155; [1891] 2 Ch. 317.

(2) (1889) 14 App. Cas. 525.

(3) [1895] 2 Ch. 265.

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that power, or if, as now, it cannot be exercised, the right of the preference shareholders to their dividend remains.

[STIRLING L.J. The text-writers treat "surplus assets" as meaning primâ facie that which remains after the payment of debts and the costs of winding-up.]

That does not conclude the question as between different classes of shareholders. Here the profits belong to the shareholders, provided that the directors do not apply them otherwise.

The directors might have declared a dividend out of the profits of the last year, notwithstanding the losses in the four previous years: *In re National Bank of Wales* (1); *Dovey* v. *Cory*. (2) The decision of Byrne J. in *In re Odessa Waterworks Co.* (3) turned upon articles which were very different from those of the present company. In that case the provision in favour of the preference shareholders was merely negative, not positive, as here, and they were not entitled to a cumulative dividend.

Cassel, for the ordinary shareholders, and

Kirby, for the liquidator, were not called upon.

COLLINS M.R., after stating the facts, continued:—The question to be decided depends, as it seems to me, upon the construction of the memorandum and articles of association of the company. Clause 5 of the memorandum gives the preference shareholders a right to a fixed cumulative preferential dividend of 5 per cent., subject to the provisions of the articles of association. Clause 6 of the articles provides at the outset what is to happen (*a*) while the company is a going concern, and (*b*) when it is being wound up. In the latter event the surplus assets are to be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon. [His Lordship then read the other clauses of the articles which are above stated, and continued:—]

This being the scheme which regulates the rights of the different classes of shareholders, Mr. Dunham has contended

(1) [1899] 2 Ch. 629. (2) [1901] A. C. 477.
(3) [1901] 2 Ch. 190, n.

that, there being this sum of 1675*l.* which represents profits earned, that is, the excess of income over expenditure, between March, 1899, and the time when the winding-up commenced, it ought to be distributed among the preference shareholders as dividend. He is met, first, by this difficulty—that the directors have never exercised their discretion in recommending the declaration of a dividend, and no doubt after the commencement of the liquidation they could not do so. It is said, however, that this is immaterial, and that the preference shareholders would have had a right to a dividend, if the company were a going concern, and the directors had not exercised their discretion in carrying the 1675*l.* to a reserve fund, and that, as the directors cannot now exercise that discretion, the preference shareholders are entitled to be paid out of the fund the arrears of dividends in former years in which no dividend was declared. In my opinion, that argument cannot be sustained. Clause 6 of the articles distinguishes between what is to be done while the company is a going concern and what is to be done when it is being wound up. This sum ought, I think, to be treated as "surplus assets" within that clause, the meaning of "surplus assets" being, as I think, that which remains after all the outside liabilities of the company have been satisfied. Then comes clause 139, which expressly deals with the distribution of surplus assets, and, if I am right as to the meaning of "surplus assets," Mr. Dunham would have great difficulty in dealing with that clause, unless the final proviso has the effect of excepting the preference shareholders from the previous part of the clause. Can we rely on the proviso for that purpose? He says that the preference shares were issued "upon special conditions," and that there can be no "surplus assets" until the claims of the holders of those shares have been satisfied. I think that would be giving a wrong meaning to "surplus assets," and I cannot see any ground for giving to that term any other meaning than the fund which remains after all outside claims have been satisfied. Does then the proviso at the end of clause 139, fairly construed, preserve the rights of the preference shareholders? What are their rights? If the company had been a going concern and there had been this balance

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of income over expenditure in the year, what right would the preference shareholders have had to it? Must the directors have applied it in payment of arrears of dividend? Certainly not. The right of the preference shareholders would have been subject to the discretion of the directors as to the application of the fund. Can this circumstance, that the directors have had no opportunity of exercising their discretion, give the preference shareholders an absolute right to that which they might not, and probably would not, have got if the directors had exercised their discretion? I think it cannot. In my opinion, the presumption is that the directors would not have applied this sum in paying a dividend to the preference shareholders. But it is not necessary to go so far as that. The onus is upon the preference shareholders to shew that this sum is available for dividend, and this they have not done and cannot now do. Upon the construction of the memorandum and articles, I think that their claim fails, and that the decision of Wright J. should be affirmed.

Several authorities have been referred to, but they have no direct bearing upon the question now before us. *In re Bridgewater Navigation Co.* (1), so far as it goes, is an authority against the claim. The articles of that company contained a clause (85) which was very strongly in favour of the right of the shareholders to a dividend after the winding-up. The capital had been all repaid to the shareholders, and all the outside claims had been satisfied, and the question was, what was then to be done with the surplus. And North J. was only dealing with the fact that no dividend had been declared before the winding-up, having regard to the very special terms of the articles. He said (2): "We have to consider what the rights of the shareholders are, although no balance-sheet was made up by reason of the summary determination of the company, as nearly as we can ascertain those rights, by reference to what they would have been if the business had continued until the end of the year, and an ordinary balance-sheet had been arrived at." That case differs from the present case in its most salient points. Reliance was also placed on the decision of

(1) [1891] 1 Ch. 155. (2) [1891] 1 Ch. 167.

Kekewich J. in *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1), which was considered by Byrne J. in *In re Odessa Waterworks Co.* (2), and was distinguished by him from that case—a distinction which was quoted and adopted by Wright J. in his judgment in the present case. If that is a sound distinction, it shews that *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1) has no application to the present case. If it is not a sound distinction, I prefer the decision of Byrne J. At all events, having regard to the special terms of the memorandum and articles in *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1), that case cannot, I think, be an authority in favour of the present appellants.

STIRLING L.J. I am of the same opinion. This company had preference and ordinary shares, both of which were fully paid up. The holders of the preference shares were entitled to a cumulative preferential dividend of 5 per cent. per annum upon the amount paid up thereon, so long as the company was a going concern. In the four years before the commencement of the winding-up the company did not declare any dividend. In the first three of those years the expenditure exceeded the income, so that there was a loss of capital amounting in the whole to 4346*l.* In the fourth year there was an excess of income over expenditure amounting to 1675*l.* The question is, whether that sum of 1675*l.* ought to go to the preference shareholders, or whether it ought to be divided as surplus assets among all the shareholders, preference and ordinary, rateably. The rights of the preference and ordinary shareholders are a matter of bargain between them, and are defined by the contract which created them. That contract is contained in the memorandum and articles of association of the company. By clause 5 of the memorandum and clause 6 of the articles the holders of the preference shares were entitled to a cumulative preferential dividend of 5 per cent. A dividend means primâ facie a payment made to the shareholders while the company is a going concern; after the commencement of a winding-up dividend is no longer payable. Primâ facie, therefore,

(1) [1895] 2 Ch. 265. (2) [1901] 2 Ch. 190, n.

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the right of the preference shareholders was limited to the payment of a preferential dividend while the company was a going concern. Clause 6 of the articles provides (*b*) what is to happen in the event of the winding-up of the company, namely, that the "surplus assets" are to be distributed between the holders of preference shares and ordinary shares according to the amount paid up thereon. Primâ facie I think "surplus assets" means that which remains after all claims of the creditors of the company and the costs of the winding-up have been paid. In the present case there has been a loss of capital, and this sum of 1675*l.*, the excess of the income over expenditure in the last year of the company's trading, is, I think, "surplus assets," and ought to be dealt with as provided by clause 6. The other material clause of the articles is clause 139. [His Lordship read it.] There again I think "surplus assets" means that which remains after all outside claims have been satisfied. But this clause is to be "without prejudice to the rights of the holders of shares issued upon special conditions." If, therefore, the preference shareholders possess any special rights, effect must no doubt be given to them. What, then, are their rights? Their rights are defined by clauses 6 and 108. Clause 108 does not give the preference shareholders any claim upon the profits simply, but only upon the profits "available for dividends." For reasons to be presently given I am not prepared to hold that this sum of 1675*l.* is really profit at all, but, assuming that it is, still the preference shareholders have to shew that it is "available for dividends." All that Mr. Dunham can say is that it might, if the directors had so thought fit, have been made "available for dividends." This has not been done, and therefore, upon the construction of the memorandum and articles, I think the decision of the learned judge was right.

I wish to add a few words about what was said by North J. in *In re Bridgewater Navigation Co.* (1) In that case there had been no loss of capital, and in the year before the winding-up profits had been earned which had not been divided. The language of the articles of association was very different from

(1) [1891] 1 Ch. 155.

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that of the articles in the present case. In that case clause 83 said that "No dividend shall be paid except out of the profits of the company arising from the business of the company, as shewn upon the balance-sheet, which shall from time to time have been examined and passed by the auditors." Clause 86 empowered the directors to pay an interim dividend. Clause 85 provided that, subject to the power of the directors to set aside out of the profits a reserve fund, &c., "the entire net profits of each year shall belong to the holders of the shares of the company, and be divided pro ratâ upon the whole paid-up share capital of the company, and the directors may, with the sanction of the company in general meeting, declare a dividend to be payable thereout on the shares in proportion to the amounts paid up thereon." And North J. said (1): "In my opinion, the preparation of a balance-sheet is not of the essence of the matter at all. We have to consider what the rights of the shareholders are, although no balance-sheet was made up by reason of the summary determination of the company, as nearly as we can ascertain those rights, by reference to what they would have been if the business had continued until the end of the year, and an ordinary balance-sheet had been arrived at." The learned judge then referred to clause 85, which was very different from any clause in the articles with which we have now to deal, and he said: "Now, at the end of the year, whatever profits there were available for division would have been divided by the directors. They would have been applied first of all in paying 5 per cent. to the preference shareholders, and the balance would have been distributable among the ordinary shareholders. In my opinion such profits would, under the words of the 85th article, have belonged to the holders of the shares in the company, and at the proper time (not at that moment, as I read it) are to be divided by the directors among the shareholders. Those, therefore, are given to the shareholders in the company; and, having regard to what took place subsequently to the time when this article was penned, and to the fact that the preference shareholders were to receive 5 per cent. only, this article would have to be

(1) [1891] 1 Ch. 167.

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read as if it said, 'shall after payment of the dividend to the preference shareholders belong to and be divided pro ratâ among the ordinary shareholders of the company.' The question is, What it is that is to be so divided? In my opinion, it is the profits which would have to be divided at the end of the year, if the company had gone on to that time and had then come to an end. In my opinion, there is nothing in the summary determination of the business of the company which gives the preference shareholders a right to say that they shall receive more than interest at 5 per cent. out of the profits of that year." In that case all the creditors of the company had been paid, and all the paid-up capital had been returned to the shareholders, and clause 85 gave the entire net profits to the shareholders, and North J. held that the sum which had been ascertained to be profits must be applied in accordance with that clause. In the present case it has not been ascertained that the excess of income over expenditure in the year before the winding-up did constitute profits. I may refer to the observations of Lindley L.J. in *Verner* v. *General and Commercial Investment Trust* (1), where he said: "It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." Those observations were cited with approval by Lord Davey in *Dovey* v. *Cory*. (2)

(1) [1894] 2 Ch. 239, 266. (2) [1901] A. C. 477, 493.

And, even if it be assumed that the passage which I have read from the judgment of North J. in the *Bridgewater Case* (1) would apply to a case like the present, in which there has been a loss of capital, what would have been done with this excess of income over expenditure, if the test mentioned by Lindley L.J. had been applied? No one can tell now. It cannot be said whether this sum of 1675*l.* could have been properly applied in the payment of dividend. It may well be that the loss of capital was a loss of floating or circulating capital, which according to Lindley L.J. must be kept up.

In my opinion, all the points taken by Mr. Dunham fail.

COZENS-HARDY L.J. I am of the same opinion, but out of respect to the very able argument of Mr. Dunham I will add a few words. His argument was based mainly on the last part of clause 139 of the articles, and he said that the preference shares were issued on special conditions, and that the rights of the preference shareholders are preserved by the final words of the clause. Can that be so, having regard to the provisions of the memorandum and articles? Clause 5 of the memorandum is in terms made subject to the provisions of the articles. Clause 6 of the articles gives a clear and precise definition of the rights of the preference shareholders. Then comes clause 139, which, as it seems to me, recognises that the rights of the preference shareholders as against the ordinary shareholders are exhaustively defined in clause 6. I think that the words "without prejudice to the rights of the holders of shares issued upon special conditions" must refer to new capital which might be thereafter issued on special conditions as provided by clause 5 of the memorandum, and that they have no reference to the preference shareholders, whose rights are completely dealt with by clause 6 of the articles. On the construction, therefore, of the memorandum and articles, I think that the preference shareholders have failed to shew that they have any right except a right to share in an equal distribution of the 1675*l.* among themselves and the ordinary shareholders.

(1) [1891] 1 Ch. 155.

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It is said that the *Bridgewater Case* (1) shews that the preference shareholders have a greater right. In that case there was nothing in the articles analogous to clauses 6 and 139 in the present case. All the capital had been returned to the shareholders, and therefore there was no question of adjusting the account as between capital and income. The only question was, as to the construction of a clause which was much stronger in favour of the shareholders than any clause in the present case. With regard to *Bishop* v. *Smyrna and Cassaba Ry. Co.* (2), I adopt what has been said by the Master of the Rolls. And if that case cannot be distinguished from *In re Odessa Waterworks Co.* (3), I prefer the decision of Byrne J. in the latter case.

Solicitors: *George Reader & Co., for Hoyle, Shipley & Hoyle, Newcastle-on-Tyne; Ashurst, Morris, Crisp & Co., for Stanton, Atkinson & Hudson, Newcastle-on-Tyne.*

(1) [1891] 1 Ch. 155. (2) [1895] 2 Ch. 265.
(3) [1901] 2 Ch. 190, n.

W. L. C.

In re I. C. JOHNSON & CO., LIMITED.

C. A. 1902 *April* 30; *May* 3, 5.

Practice—Company—Debentures—Registration—Extension of Time—Protection of Creditors—Series of Debentures ranking pari passu—Preservation of Rights of Debenture-holders inter se—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

The directors of a company resolved in 1899 to raise 85,000*l.* on debentures. The debentures were secured on property included in a covering deed and by a charge on all the property of the company, including its uncalled capital, for the time being as a floating charge, and were stated to form one series all of which were to rank pari passu. Some of the series were issued before the Companies Act, 1900, came into operation, and, therefore, did not require registration. Three hundred and twenty-seven of the remaining debentures were issued after that date, but were not registered. The holders of these debentures and the company applied for an extension of time to enable them to carry out the registration.

Kekewich J. extended the time, but added to the order the qualification introduced by *In re Joplin Brewery Co.*, [1902] 1 Ch. 79, for the protection of creditors :—

Held, by the Court of Appeal, that the order must be varied in such a way as to preserve the rights of equality of the debenture-holders inter se.

Appeal from an order made by Kekewich J. and continued by Joyce J.

By a resolution of the directors of the company, passed on June 16, 1899, it was resolved to issue debentures to the amount of 85,000*l.* By an indenture or covering deed of February 22, 1900, certain freehold and leasehold properties of the company were conveyed to trustees by way of mortgage to secure the series of 1700 debentures of 50*l.* each which it was proposed to issue in accordance with the resolutions.

The debentures were in a form by clause 6 of which the company charged with payment of the sum secured "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital (if any) for the time being."

Clauses 7 and 8 were as follows :—

"7. This debenture is one of a series of 1700 debentures, each for securing the principal sum of 50*l.*, issued or about to

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be issued. The debentures of the said series are all to rank pari passu as a first charge on the property charged by the last preceding clause without any preference or priority one over another. And such charge is to be a floating security, but so that any dealing by the company with the hereditaments comprised in the trust deed hereinafter mentioned, or any of them, shall be subject and without prejudice to the trusts and provisions therein declared and contained.

"8. The holders of the debentures of the above issue are and will be entitled pari passu to the benefit of and subject to the trusts and provisions declared and contained in" the deed of February 22, 1900.

Prior to January 1, 1901, when the Companies Act, 1900, came into operation, 1212 debentures of the said series were issued to the amount in all of 60,600*l*. Since that date 327 debentures had been issued, and these last-mentioned debentures had not been registered under s. 14 of the Companies Act, 1900. On a proposed issue of further debentures forming part of the same series, the question was raised whether the section did not apply to all debentures issued after the commencement of the Act (although part of a series authorized and specifically charged before the Act) by reason of their containing a charge by way of floating security on the undertaking and property, including uncalled capital of the company created on the day of their issue. In March, 1902, the company and the holders of the 327 debentures applied by originating motion for an order that the time fixed for registration in manner required by the Companies Act, 1900, of particulars of the debentures specified in the schedule to the notice of motion might be extended until after the expiration of twenty-one days from the date of the order to be made thereon, or that such further or other order might be made in the premises as the Court might deem expedient. The schedule gave the names of the holders and the numbers of the 327 debentures which had been issued since the commencement of the Act.

On March 21, 1902, Kekewich J. made an order that "this Court, being satisfied that the omission to register the several debentures in the said company set forth in the schedule hereto

within the time required by the Companies Act, 1900, was accidental, doth, pursuant to the 15th section of the said Act, order that the time for registration of the said debentures be extended until the 18th day of April, 1902, inclusive; but this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered."

On April 15 Joyce J., in the absence through illness of Kekewich J., further extended the time till May 18, so as to give time to appeal, and inserted the same words in the order.

The company and the holders of the 327 debentures appealed, and asked that the orders might be reversed or varied so far as they directed that the orders were to be without prejudice to the rights of other parties, and that the direction might be omitted, or that a provision should be added that the direction was not to give priority to any of the debentures over others of the same series.

Haldane, K.C., and *Christopher James*, for the appellants. We do not object to registering the debentures, and the company is in such a prosperous condition that there is no chance of any claims arising before they are registered. But the effect of the proviso that the order is to be without prejudice to the rights of parties acquired before the registration will be to give the holders of the debentures issued before January 1, 1901, priority over those which have been issued since that date. That result will be directly contrary to the bargain between the debenture-holders by which all the debentures were to form one series and rank pari passu, and will make it impossible to issue the rest of the series. The bargain shews that it was contemplated that the debentures should be issued at different dates. As against creditors or a liquidator of the company, the holders of the debentures first issued would no doubt have priority, but as against the other debenture-holders they ought not to be in that position. Kekewich J. followed the decision of Buckley J. in *In re Joplin Brewery Co.* (1) In that case the proviso was introduced for

(1) [1902] 1 Ch. 79.

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the first time, but the whole of the debentures required registration, and there was no question of the rights of the debenture-holders inter se. The rule was followed in *In re Spiral Globe, Limited* (1), where the circumstances were similar, but a liquidation had supervened. And in *In re S. Abrahams & Sons* (2), where the debentures were in the same position as those in the present case, Buckley J. held that the qualification ought to be inserted; so we are to a certain extent appealing from that decision also, although his Lordship refused to make the order extending the time on the ground that, if it included the qualification, it would be useless, inasmuch as the company had gone into liquidation. The last case on the subject is *In re Spiral Globe, Limited* (*No.* 2), *Watson & Co.* v. *Spiral Globe, Limited* (3), in which it was held that debentures did not require registration where the charge was created before January 1, 1901. We admit that that does not apply to the present case, as the floating charge does not come into operation until the debentures are respectively issued.

Neville, K.C., and *J. G. Pease*, for some of the debenture-holders whose shares had been issued before January 1, 1901. We agree that registration is necessary in the case of debentures issued after the commencement of the Act. Sect. 14 speaks of the creation of a charge—that is, in this case, the floating charge which is created when the debenture is issued. The debentures were charged on other property besides that comprised in the covering deed. The only question before the Court is on what terms an extension of time ought to be granted. The ordinary rule ought to be followed; it was adopted from the analogy of orders made in cases under s. 14 of the Bills of Sale Act, 1878, in which similar words were inserted: *Crew* v. *Cummings* (4); *In re Parsons*. (5) There is no reason for departing from the rule. The appellants only come here on the footing that we have acquired priority. It is true that in the authorities accrued rights generally mean rights of execution creditors or trustees in bankruptcy. But

(1) [1902] 1 Ch. 396.
(2) [1902] 1 Ch. 695.
(3) W. N. (1902) 82; post, p. 209.
(4) (1888) 21 Q. B. D. 420.
(5) [1893] 2 Q. B. 122.

if we have any rights the appellants cannot take them away; and if we have acquired no priority the appellants ought not to be here. The Court will not inquire on these applications what rights have actually accrued. The rule was adopted to prevent waste of time in that way.

[COLLINS M.R. If the clause can give you a priority, ought we not, in the exercise of our discretion, to alter the language?]

No reason has been shewn for depriving us of our rights. If the company are unable to issue the rest of the series, that will be all the better for us.

Haldane, K.C., in reply.

COLLINS M.R. This is an appeal from an order made by Kekewich J. following the terms of an order made by Buckley J., and the question arises upon the 14th and 15th sections of the Companies Act, 1900. Now the 14th section provides: "(1.) Every mortgage or charge created by a company after the commencement of this Act and being either—(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; or (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured." The company in question having power to do so resolved to issue debentures to the extent of 85,000*l.* They succeeded in actually issuing debentures for a considerable part of that sum, and those debentures were issued before the Act came into operation, and, therefore, at a time when registration was not necessary. That did not embrace the whole issue, and they afterwards issued others after the commencement of the Act which were not registered within the time prescribed by the

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Act, and, therefore, they were in a condition which obliged the company and the debenture-holders to have recourse to the 15th section—the next section—which I am about to read and which runs thus: "A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by this Act, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified." It is not disputed here that the case does come within the 15th section, and that the judge has properly exercised his discretion in enlarging the time for the registration; but the point that does arise is as to a qualification upon that right which has been inserted in the last words of the order: "The Court being satisfied that the omission to register," and so forth, "was accidental, doth, pursuant to the 15th section of the Act, order that the time for registration of the said debentures be extended unto the 18th April, 1902, inclusive." Then come the words that are objected to: "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." Now it is said by Mr. Haldane for the appellants that those words are capable of being interpreted and, in fact, primâ facie, do involve this—that that proportion of the debenture-holders whose debentures did not require registration will take priority over those as to which this order permitting registration was made; and he says that such a result is one that this Court ought not to permit, because as regards the contract under which these debentures were created the most fundamental stipulation provides that all the debenture-holders of the series are to rank pari passu; and that if the mere omission to register, under circumstances excused

by the judge, is to be held to have the effect of giving different rights between themselves, and giving those whose debentures did not require registration priority, and putting these two sets of debenture-holders upon an inequality, then that is really to defeat the fundamental provision of the contract under which they were issued; and that that is a consequence which certainly ought to be avoided if the statute does not compel us to accept it. I assume that the words in the order are capable of, and, indeed, primâ facie, do bear, the construction which the appellants object to; and, dealing with it on that footing, the question is whether or not, construed in that way, it is properly within the section as interpreted by some decisions which have already been made upon it. Now, the decision of Buckley J. in *In re Joplin Brewery Co.* (1) was the decision upon which Kekewich J. based his order in this case. I do not think he gave any opinion on the matter himself, but he simply followed the form which Buckley J. accepts. Buckley J. in that case says this. He reads s. 14 of the Bills of Sale Act, 1878, and s. 15 of the Companies Act, 1900, and he then says (2): "The language of the latter section is larger than that of the former, but I do not see that the variance makes any difference to the point with which I have to deal. Under s. 14 of the Companies Act, 1900, a security if not registered within a given time is void as against the liquidator and any creditor of the company. These applications are made without serving the creditors, and the orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale." He therefore treats the two provisions in the two Acts as analogous. "I therefore direct that there be added to the order the words: 'but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered'; and I intimate my opinion that these words ought to be added in every case, unless there is some good ground to the contrary—e.g., in cases in which the order could not prejudice the rights of any creditors." Now, the words in this order

(1) [1902] 1 Ch. 79. (2) [1902] 1 Ch. 81.

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are: "But that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered." For the purposes of this application, ought there to be any doubt as to whether the mere fact of a portion of these debentures being issued before registration became necessary, and the second part being issued after it became necessary, and requiring the indulgence which is given under the 15th section—ought to make any difference between the rights of these parties inter se? It seems to me that it certainly ought not: that the mere fact of their bonds having been issued at a time when registration was not required does not put them, and ought not to put them, in any better position than those debenture-holders who have had their bonds issued to them after registration became necessary, even although they made a slip and did not come within the proper time. How is that to be met? It seems to me that the condition under which these debenture-holders took their securities was that, as between themselves, they were to rank pari passu. That agreement was made in view of the certainty that they would not in point of fact be issued at one and the same time, and it was to meet the possible contention that those who took first should have the first rights that that provision negativing that, and indicating that they should take equally pari passu, was introduced.

Therefore, it seems to me that the mere fact of there having been a slip in the matter of registering the second set, and that the first did not require registration at the time they were issued, did not alter the rights of the parties inter se, and that words ought to be introduced into this order to make that practically clear. While, at the same time, the rights of these parties inter se ought not to be interfered with merely on the facts that I have stated, it is possible that under the section the rights of other outside persons might intervene. It is impossible to say exactly under what circumstances they could intervene. It is not necessary for us in this case to decide whether any creditor who had not actually issued execution is a creditor who ought to be protected and who ought to displace the rights of those who were not registered until after his debt had accrued.

It is not necessary to give a decision upon that point, though I am bound to say that Buckley J.'s judgment, which purported to apply this Act on the analogy of the clause in the Bills of Sale Act, does seem in these terms rather to enlarge the area to which the Bills of Sale Act was held to be limited, for, instead of dealing with creditors who have actually issued execution—that had been the subject of discussion under former Acts—he says this: "The orders ought to be drawn so as to save the rights of persons who have become creditors of the company before registration is effected, just as in the case of bills of sale." Now, with respect to bills of sale, one case has been cited to us which went to the Court of Appeal, and in which Bowen L.J. gave the judgment in which Lord Esher M.R. agreed. That was the case of *Crew* v. *Cummings*. (1) In that case an execution had actually been put in between the date of the bill of sale and the time of the application to enlarge the time for registration, and the Court held that the time for registration could not be extended under the 14th section so as to defeat the vested right of an execution creditor. The Court took time to consider, and, having considered, they based their judgment on the fact that a title had been acquired by the creditor who had put in execution. "I do not think that the Act of Parliament," says Bowen L.J., "in giving the power to extend the time could have intended that such an extension of time should be granted after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the Act." Now it seems to me that that judgment is given on the footing that, but for the execution put in, the creditor would have taken no rights which would have been interfered with by giving permission to extend the time necessary for the registration of the bill of sale. However, it seems to me that it is not necessary for the Court to decide any point about creditors, whether execution creditors or others; but what we can decide, and what I think the order ought to provide for, is that as between these two sets of debenture-holders this fact of registration and failure to register ought not

(1) 21 Q. B. D. 420, 423.

C. A. 1902 I. C. JOHNSON & Co., LIMITED, *In re.*

to make any difference, and that their rights inter se ought to rank pari passu. The order will be considered by counsel and will be framed to meet that view, and we shall have an opportunity of considering it; but it seems to me on these grounds the order as it stands ought to be altered, and that, to that extent, this appeal ought to be allowed.

STIRLING L.J. I agree.

COZENS-HARDY L.J. I agree. I only just wish to add this—that s. 15 indicates or points out various circumstances under which the Court may exercise its jurisdiction. One of those is when the registration is not of the nature to prejudice creditors; but if there has been omission, misstatement, or inadvertence, or some other sufficient cause, the Court is empowered to allow registration although it will affect the creditors. The analogy of the Bills of Sale Act which Buckley J. took in *In re Joplin Brewery Co.* (1) seems to me to be very close and precise; but, speaking for myself, I doubt whether the words which he has inserted—which are a mere transcript of the common form under the Bills of Sale Act—would have any effect in protecting creditors who had not taken some proceedings to get a charge or a security upon the goods.

[A form of order was accordingly submitted to the Court, when it was suggested by Stirling L.J. that, if a winding-up commenced within the extended time and before the 327 debentures were registered, those debentures would be bad as a security against the liquidator and the assets, and that the order should provide that in that event the debentures issued before registration was necessary, whose charge on the assets would still be good, should not be called upon to share the benefit of that charge with the 327 debentures.]

The minutes of the order as eventually settled were, after appointing the respondents to represent all the debenture-

(1) [1902] 1 Ch. 79.

holders of the series except the appellant debenture-holders, as follows:—

Discharge the orders of the 21st March, 1902, and the 15th April, 1902.

And in lieu thereof, this Court being satisfied that the omission to register the several debentures of the appellant company set forth in the schedule to this order within the time required by the Companies Act, 1900, was accidental, doth pursuant to the 15th section of the said Act order that the time for registration of the said debentures be extended until the 18th of May, 1902, inclusive: Provided always that this order is to be without prejudice to any rights (other than rights in respect of debentures of the said series) which may have been or may be acquired against the holders of the said debentures set forth in the schedule to this order prior to the time when the last-mentioned debentures shall be actually registered. And it is hereby declared that, except so far, if at all, as may be necessary for giving effect to the proviso aforesaid, such proviso shall not interfere with the rights of equality among themselves attached to all the debentures of the said series, but so that in the event of the debentures set forth in the said schedule being avoided as against parties having any such rights as are preserved by the said proviso, none of the holders of the debentures of the said series other than the holders of the debentures set forth in the said schedule shall by reason of such avoidance be required to accept any less share of the assets comprised in his security than he would have taken if there had been no such avoidance.

And let the appellant company pay to the respondents their costs of this appeal, to be taxed in case the parties differ.

Solicitors: *Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-on-Tyne.*

H. C. R.

KEKEWICH J.

1902

Jan. 15.

In re MARE.
MARE *v.* HOWEY.

[1901 M. 1812.]

Settlement—Construction—Ultimate Trust for Next of Kin of Wife—"Die without having been Married."

By a marriage settlement a fund was settled in the events of there being no child of the marriage who, being a son, should attain the age of twenty-one, or being a daughter should attain that age or marry, and of the wife dying in the lifetime of the husband, upon such trusts as the wife should by will or codicil appoint, and in default of appointment upon trust for such person or persons as under the Statute for the Distribution of Intestates' Effects should or would have been entitled to her personal estate "in case she had died intestate without having been married." The wife died intestate in the lifetime of the husband, leaving an only son who died an infant:—

Held, that the case was governed by *Wilson* v. *Atkinson*, (1864) 4 D. J. & S. 455; that in conformity with that decision the words referring to death "without having been married" must be construed as intended to exclude the husband, and not as intended to exclude a child, and that therefore on the death of the wife intestate her infant son became entitled as her sole next of kin.

ADJOURNED SUMMONS.

By an indenture of settlement dated January 4, 1847, and made between William Salmon Mare of the first part, Annie Marshall Wilson of the second part, Charles John Mare of the third part, and Michael D. Hollins and John Marshall of the fourth part, being the settlement made on the marriage of William Salmon Mare and Annie Marshall his wife, certain hereditaments were conveyed to trustees upon trust for sale and conversion, and to stand possessed of the proceeds upon usual trusts in favour of W. S. Mare and Annie M. Mare successively for life, and afterwards for the children of the marriage; but in case there should be no child of the marriage, who being a son should live to attain the age of twenty-one years, or being a daughter should live to attain that age or be married, then it was declared that the trustees or trustee for the time being should stand possessed of and interested in the trust moneys, upon trust as to one moiety thereof, if W. S.

Mare should happen to survive Annie M. Mare, upon trust for W. S. Mare, his executors and administrators; and as to the other or remaining moiety of the trust moneys, upon trust if Annie M. Mare should happen to die in the lifetime of her husband, then for W. S. Mare during the term of his natural life, or until he should by operation of law, or by assignment as therein mentioned, cease to be entitled thereto; and then upon and for such trusts, intents, and purposes, and in such manner in all respects as Annie M. Mare, notwithstanding her coverture, by will or codicil should direct or appoint; and in default of and subject to any such direction or appointment, upon trust for such person or persons as under or by virtue of the Statute for the Distribution of Intestates' Effects should or would have been entitled to her personal estate "in case she had died intestate without having been married"; and if more than one, for them in the same manner as they would be entitled to such personal estate under such statute.

Annie M. Mare died in the lifetime of W. S. Mare, namely, on August 29, 1848, intestate.

There was one child of the marriage only, namely, Frederick William Mare, who was born in the year 1847 or 1848, and died in the month of June, 1864, an infant, without having been married.

At the time of the decease of Annie M. Mare the person (exclusive of Frederick William Mare) who under or by virtue of the Statute for the Distribution of Intestates' Effects would have been entitled to her personal estate in case she died without having been married was her father, George Wilson. He died on August 29, 1856, and at the present time had no legal personal representative.

W. S. Mare died on November 5, 1898, without having forfeited his life interest in the second moiety of the trust funds, and having by his will appointed his second wife, Isabella Mare, and his son by her, Charles Dennis Mare, his executors.

Upon the decease of W. S. Mare the question arose whether upon the death of Annie M. Mare intestate the second moiety

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of the trust funds devolved upon her only child, Frederick William Mare, or, to the exclusion of him, upon the person or persons who under the Statute of Distribution would be her next of kin at her death; and for the determination of this and other questions an originating summons was taken out by Charles Dennis Mare and John Blow Ashwell, the existing trustees of the settlement, as plaintiffs, against the defendant, Violet Howey, as the person entitled to take out administration de bonis non to George Wilson, the father of Annie M. Mare, the defendant Isabella Mare as the person who, together with the plaintiff Charles Dennis Mare, was entitled to take out administration to the estate of Frederick William Mare, and certain other defendants representing the class of persons who would be entitled as next of kin of Annie M. Mare, if such class was to be ascertained at the death of W. S. Mare.

Manby, for the applicants, the trustees, stated the case to the Court.

Gent, for the persons entitled to take out administration to the deceased son, Frederick William Mare. The infant child, having survived his mother, became entitled as her sole next of kin. Ultimate limitations of this kind in favour of the next of kin of the wife are always construed by the Court as being designed to exclude the husband, and the words "without having been married" are held not to have the effect of excluding a child. The most recent case on the subject is *Stoddart* v. *Saville* (1), where Chitty J. went through all the authorities and held that the point was concluded by *Wilson* v. *Atkinson*. (2) Other authorities to the same effect are the decisions of Fry J. in *In re Ball's Trust* (3) and *Upton* v. *Brown* (4), Stirling J. in *In re Arden's Settlement* (5), and Romer J. in *In re Forbes*. (6) *Pratt* v. *Mathew* (7) is an earlier authority than *Wilson* v. *Atkinson* (2), and to the same effect.

Hon. Frank Russell, for the person entitled to take out administration to George Wilson. *Wilson* v. *Atkinson* (2) did not

(1) [1894] 1 Ch. 480.
(2) 4 D. J. & S. 455.
(3) (1879) 11 Ch. D. 270.
(4) (1879) 12 Ch. D. 872.
(5) W. N. (1890) 204.
(6) W. N. (1899) 6 (4).
(7) (1856) 22 Beav. 328; affirmed on appeal (1856) 8 D. M. & G. 522.

lay down any general rule of construction. That is clearly explained by Sir George Jessel in *Emmins* v. *Bradford*. (1) That was a strong case, because the Court, construing the words "without ever having been married" according to their literal meaning, excluded the children of the deceased wife by a former marriage. In this case the Court is not asked to exclude a child. The infant child if he had attained twenty-one would have become entitled under the previous part of the settlement. It is to be observed that in all the cases cited except *Upton* v. *Brown* (2) the settlement did not contain any provision for the children. *Emmins* v. *Bradford* (1) has been followed by the Master of the Rolls in Ireland, first in *Hardman* v. *Maffett* (3), and recently in *In re Deane's Trusts* (4), and I ask your Lordship to follow that, the latest, decision.

S. B. L. Druce, for other parties, adopted the same arguments and referred to *Clarke* v. *Hayne*. (5)

KEKEWICH J. With great respect to counsel, they have, so to speak, been ploughing the sand. I do not think that the question which has been argued is open to me at all, and so far as I can gather learned judges before whom the question has come have arrived at the same conclusion. No counsel has yet referred to the case of *Wilson* v. *Atkinson* (6) otherwise than incidentally by noticing that it has been referred to in other cases cited. But to my mind *Wilson* v. *Atkinson* (6) is the authority which governs the whole question now before me. There there was a clause as nearly as possible the same as that which we have here. The limitation was "in trust for such person or persons as under the Statutes for the Distribution of the Effects of Intestates would have become entitled thereto at the decease of the said Jane Wilson, if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common and in the shares in which they would have taken under the same statutes." That is almost word for word the same as the

(1) (1880) 13 Ch. D. 493.
(2) 12 Ch. D. 872.
(3) (1884) 13 L. R. Ir. 499.
(4) [1900] 1 I. R. 332.
(5) (1889) 42 Ch. D. 529.
(6) 4 D. J. & S. 455.

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clause in the present case, and the decision there was that the child surviving the wife took on the ground that the only object of the provision was to exclude the husband. It so happened that in that case there was a peculiar provision, which does not often occur. The lady had an illegitimate child, and there was an express declaration that the illegitimate child should for all purposes of the trust be deemed to be a lawful child, and there was considerable argument to shew that the child was not intended to be excluded, and that it would have been contradicting the settlement to exclude it. But both Knight Bruce L.J. and Turner L.J. took pains to explain that, quite irrespectively of that, the child treated as a child took, and that the declaration was useless to make her take as a child. This is what Turner L.J. says in the plainest possible terms (1): "Even if it be necessary to construe the terms of the trust for next of kin independently and without qualifying them by the subsequent declaration, still in my judgment the trust for the next of kin ought not to be so construed as to exclude children." That is the expression of the judgment of Turner L.J., and it is impossible for me to construe this settlement in any other way. In *Stoddart* v. *Saville* (2) Chitty J. went through the cases and came to the conclusion that he was bound by *Wilson* v. *Atkinson*. (3) In *Emmins* v. *Bradford* (4) Sir George Jessel M.R. saw his way out of it, and the Master of the Rolls in Ireland in *In re Deane's Trusts* (5) followed *Emmins* v. *Bradford*. (4) But, notwithstanding those decisions and with great respect for them, I have no doubt as to my duty. There is a clear decision of the Court of Appeal, covering the exact case, and I have nothing to do but to follow it. I do follow it, and there must be a declaration that Frederick William Mare became entitled to this moiety of the trust funds as sole next of kin of his mother.

Solicitors: *Wedlake, Letts & Wedlake, for Marshall & Ashwell, Stoke-upon-Trent; Crossman, Prichard & Co.; Woodcock Ryland & Parker, for Underwood & Steel, Hereford.*

(1) 4 D. J. & S. 461.
(2) [1894] 1 Ch. 480.
(3) 4 D. J. & S. 455.
(4) 13 Ch. D. 493.
(5) [1900] 1 I. R. 332.

C. C. M. D.

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April 29; *May* 13.

[1901 N. 920.]

Mortgage—Portion—Priority—Mortgage pursuant to Order of Court to raise two out of three Portions charged on Real Estate.

Under the will of a testator who died in 1851 three sums of 5000*l.* for children's portions were charged on his real estate. In 1880 two of the portions had become raisable, and in an action brought for the purpose of clearing the estate from charges an order was made in 1882 directing that the two portions should be raised by a mortgage of the estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was afterwards distributed among the persons interested. In an action by the mortgagee claiming priority over the persons interested in the remaining portion:—

Held, that the Court, in fulfilling the testator's directions, which was its only duty, could not have intended to place two of the portions in a better position than the third, or to give the mortgagee a charge for the two in priority to the third, which was from the first equally entitled to a like charge under the will:

Held, therefore, that, notwithstanding that the third portion was at present only charged in equity by virtue of the will, whereas the plaintiff had a legal mortgage sanctioned by the Court, the plaintiff was only entitled to a charge on the estate for the two sums of 5000*l.* pari passu with the third sum of like amount.

TRIAL of action for realization of a mortgage, raising questions as to the priority of charges on the real estate devised by the will of Henry Muskett.

The facts of the case, as stated by Kekewich J. in his written judgment, were as follows:—

Henry Muskett had three daughters, Emily Louisa Dashwood, Clara Hannah Reynolds, and Julia Matilda Etheridge. The first two married before he made his will, but the other was then a spinster. On the marriage of Mrs. Dashwood in 1847 he secured to her by bond, given to the trustees of her marriage settlement, a sum of 5000*l.*, and on the marriage of Mrs. Reynolds in 1848 he secured a like sum of 5000*l.* by

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covenant. The sum of 5000*l.*, which was in each case made payable after the death of Henry Muskett, was also in each case settled on the children of the marriage attaining twenty-one. In each case two life annuities were also secured as a provision for the daughter and her husband until the 5000*l.* became payable.

Henry Muskett made his will dated April 16, 1849. He thereby gave to his daughter Mrs. Etheridge (then unmarried) an annuity of 200*l.* for her life, and in case she should marry and leave children he gave for the portions of such children attaining twenty-one the sum of 5000*l.* He subjected and charged specified real estate (which was in fact all his real estate) with the annuity to his said daughter, as also with an annuity given to his wife, and with the said sum of 5000*l.* He referred to the bond given on the marriage of Mrs. Dashwood, and the settlement of the 5000*l.* thereby secured; and after confirming the bond and settlement in every respect, he exonerated his personal estate from the payment of the several annuities and sums of money so secured and made payable, stating his intention that the same should be charged upon and payable out of his real estate only. He referred to the settlement made on the marriage of Mrs. Reynolds, confirmed that also, exonerated his personal estate from the payment of the several annuities and sums of money thereby secured and made payable, and stated his intention that the same should be charged upon and payable out of his real estate only. He gave the residue of his personal estate to his son Henry Joseph Muskett, subject nevertheless to and after payment of his just debts and his funeral and testamentary expenses, and certain legacies which he had given to his wife and daughters respectively; and he provided that in case his personal estate should be insufficient for the payment of his debts and funeral and testamentary expenses and the legacies thereinbefore last mentioned, the same should be a charge upon and payable out of his real estate, which he thereby gave to his said son for his life, with remainder to his children.

Henry Muskett died in 1851. His daughter Julia Matilda married Mr. Etheridge in 1856, and died in 1858 leaving one

child, who attained twenty-one in October, 1879. Mrs. Dashwood died in 1880. She had two children, who attained twenty-one before May, 1882. Mrs. Reynolds had several children, one of whom at least attained twenty-one before May, 1882. Mrs. Reynolds was still alive, and was the first defendant to the action.

In 1880 Henry Joseph Muskett, the testator's son and devisee for life of the real estate, commenced an action of *Muskett* v. *Muskett* (1880 M. No. 01046) in the Chancery Division in order to get the real estate cleared of the charges thereon. The action was properly constituted for this purpose, such of the parties interested as were not made defendants in the first instance being served with notice of the decree, and therefore equally bound by the proceedings as if they had been named defendants. There was a statement of claim (to be hereafter referred to), and on July 3, 1880, a decree was made by Hall V.-C. directing numerous inquiries mainly concerned with the parties interested in the real and leasehold estates passing by the will and the charges thereon. The 1st and 13th inquiries were in the following terms:—

1. An inquiry whether the debts of the testator other than the bond debt of 5000*l.* to the plaintiff and to William Collett Reynolds and Robert Fickling, and other than the sum of 5000*l.* secured by the testator's covenant with Charles Burton Dashwood and the said Robert Fickling in the said will respectively mentioned, and whether the funeral and testamentary expenses of the testator and the pecuniary legacies given by his said will, other than the portion of 5000*l.* bequeathed to the child or children of his daughter Julia Matilda, have been respectively paid.

13. An inquiry whether any and which of the several portions of 5000*l.* and 5000*l.* in the said will respectively mentioned and thereby charged upon the testator's real estate in exoneration of his personal estate are now raisable, and to whom such of the said portions as are now raisable ought to be paid.

The decree gave liberty to apply in chambers for raising by sale or mortgage what was necessary for the purpose of

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satisfying such, if any, of the testator's debts as remained unpaid and were then raisable out of his real estate, and also what should be certified to be due in respect of the principal of such of the said portions respectively as should for the time being be raisable, together with the costs of action.

This decree was based on a statement of claim which set forth the will at length, and stated that the plaintiff, to whom administration with the will annexed had been granted, had long since received and got in the personal estate of the testator, and had paid thereout the testator's debts and funeral and testamentary expenses and the legacies given by his will, other than the said portion of 5000*l.* for the child or children of his daughter Julia Matilda. It also stated that Mrs. Etheridge and Mrs. Dashwood and Mrs. Holmes, one of the latter's children who had attained twenty-one, had respectively applied to the plaintiff and had required payment of their portions of 5000*l.* and 5000*l.* The plaintiff claimed inquiries respecting the said several sums of 5000*l.*, 5000*l.*, and 5000*l.*, and that such (if any) of them as were then due and payable might be ordered to be raised by mortgage of the real estate, and that provision might be made for raising the other or others of the said portions when the same became payable.

The chief clerk's certificate in answer to the inquiries directed by the decree was made on February 17, 1882. The answer to the inquiry No. 13 commenced thus: "Of the several portions of 5000*l.*, 5000*l.*, and 5000*l.* in the said will respectively mentioned, and thereby charged upon the testator's real estate in exoneration of his personal estate, only the following are now raisable, that is to say," and it then proceeded to find that the portion of 5000*l.* given for the children of Mrs. Etheridge, and also the portion of 5000*l.* given or secured to the children of Mrs. Dashwood, were then raisable, and ought respectively to be paid to the persons in the certificate mentioned in that behalf.

The decree did not reserve further consideration, but an application was made in chambers under the liberty to apply, and on that application an order was made dated May 17, 1882. It provided for the taxation of costs, and, after reciting that it

appeared by the chief clerk's certificate that the sums of 5000*l.* and 5000*l.* were then raisable in respect of the portions of the children of Mrs. Etheridge and Mrs. Dashwood, it was ordered that the said sums and costs should be raised by a mortgage of the real estate to one Samuel Nightingale, who was willing to lend the same, and that such mortgage should be settled by the judge. Provision was made for the execution of the mortgage, and the money lent was ordered to be paid into court, and, after directing payment thereout of the taxed costs, it was further ordered that thereout also the said sums of 5000*l.* and 5000*l.* and 185*l.* 19*s.* 10*d.*, which had been expended in the enfranchisement of copyholds, should be paid to such persons as should be certified to be entitled to receive the same, and in such proportion as should be also certified.

The mortgage was settled and executed as directed by the order. The moneys lent, including the taxed costs and the enfranchisement moneys, amounting altogether to 10,862*l.* 12*s.* 3*d.*, were paid into court, and on August 2, 1883, there was a further certificate finding to whom the moneys were payable. For the present purpose it is sufficient to say that 5000*l.* was certified to be payable and was paid to the trustees of Mrs. Etheridge's only child, and 5000*l.* was found payable and was paid to the children of Mrs. Dashwood or those claiming through them.

The mortgage was dated July 21, 1883, the parties being Henry Joseph Muskett (the person appointed by order of the Court to convey) and Samuel Nightingale. It was a lengthy document, and contained many recitals, including, of course, all the Chancery proceedings. There were recitals to the effect that the portions of Mrs. Etheridge and Mrs. Dashwood were raisable by reason of those ladies having had children who attained twenty-one, and that Mrs. Reynolds was still living and had had several children, but their ages were not mentioned. The operative part was as follows: "Now this indenture witnesseth, that in further pursuance of the said recited order, and by virtue thereof, and in consideration of the said sum of 10,862*l.* 12*s.* 3*d.* so paid by the said Samuel Nightingale as aforesaid, he the said Henry Joseph Muskett,

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as beneficial owner, so far as relates to his estate and interest for life under the said recited will of the said Henry Muskett in the hereditaments intended to be hereby assured, and so as to pass the full benefit of the charge created by the same will in priority to the said life estate or interest, for the purpose of raising the portions of 5000*l.* and 5000*l.*, provided respectively for the child or children of the said Julia Matilda Etheridge, and for the children of the said Charles Burton Dashwood and Emily Louisa his wife, and the interest on the same portions respectively, and as trustee so far as relates to the estate or interest of the persons entitled in remainder in the same hereditaments, hereby grants and conveys unto the said Samuel Nightingale all and singular the manor or lordship, or reputed manor or lordship, advowson, capital and other messuages, farms, lands, tenements, and hereditaments specified and particularized in the schedule hereunder written, being part of the hereditaments and premises mentioned in the first schedule to the chief clerk's certificate made in the said action, to hold unto and to the use of the said Samuel Nightingale in fee simple and particularly as to the premises specified and particularized in the second part of the said schedule hereto, with the full benefit and advantage of the enfranchisement intended to be made thereof as aforesaid, but as to the premises specified and particularized in the third part of the same schedule according to the custom of the same manor of Burgh Vaux, and by and under the rents, suits, and services therefor due and of right accustomed, and subject as to the life estate or interest of the said Henry Joseph Muskett to the mortgage thereon hereinbefore mentioned, and as to all the said hereditaments and premises without prejudice to any charge which may be subsisting therein under the said will of the said Henry Muskett, subject to the proviso for redemption hereinafter contained." The proviso for redemption in effect was that on the principal and interest being paid the property should be conveyed to the then subsisting uses or limitations of the will.

The mortgagee Samuel Nightingale died in 1886, having by his will appointed his son, the plaintiff Samuel Nightingale,

and two other persons his executors, and by an indenture of March 14, 1890, the mortgage was duly transferred to the plaintiff, who now brought this action, claiming a declaration that he was entitled in respect of his security to priority as against the hereditaments comprised therein over the Reynolds portion of 5000*l.*, and foreclosure, accounts, and other relief. The defendants were Mrs. Reynolds and her children, the seven children of Henry Joseph Muskett, deceased, and the National Reversionary Investment Company, who were assignees of the share of one of the children of Mrs. Reynolds.

P. O. Lawrence, K.C., and *J. K. Young*, for the plaintiff. By virtue of the mortgage of July 21, 1883, the plaintiff, as legal mortgagee, is entitled to a first charge on the mortgaged hereditaments, in respect of the 10,862*l.* 12*s.* 3*d.* advanced by him and paid into court in the action of *Muskett* v. *Muskett*, in priority to Mrs. Reynolds' portion of 5000*l.*, which remained charged on the same hereditaments under the will of Henry Muskett. The action of *Muskett* v. *Muskett* being properly constituted, the Court had full jurisdiction to make the orders of July 3, 1880, and May 17, 1882, and the mortgage made in pursuance of them must take effect according to the tenor of the deed. It will be said that the words "without prejudice to any charge which may be subsisting therein under the said will" mean that the mortgage is to rank pari passu with the portion of Mrs. Reynolds; but it is submitted that these words were merely inserted ex majore cautelâ by the conveyancer. The proviso for reconveyance on redemption is to the "then subsisting uses or limitations" of the will, and the meaning and intention is that the reconveyance is to be made subject to the subsisting limitations, but without prejudice to any charge.

The contention on the other side is that this is not a first mortgage of the real estate, but a transfer of the charges subsisting in respect of the two portions of 5000*l.*, namely, the Dashwood and Etheridge portions. That is not so. Where there is a clear charge for three sums, and two, becoming raisable, are raised by mortgage, the mortgagee gets priority.

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The Court could, if it thought fit, direct a mortgage to raise all three, and then reserve one until it became distributable; but if two only are raised the mortgagee, in the absence of express provision to the contrary, gets a first mortgage for the amount of the two. If it were otherwise, he would have a security which could not be realized. Again, the Court might, if it had thought fit, have allotted specific portions of the estate as the security of the mortgagee, and retained the rest. It must be taken that the other parties to the action of *Muskett* v. *Muskett* were content, in respect of the Reynolds portion, to rely on the security which the will gave them, subject to the mortgage held by the plaintiff. Probably in 1880 the value of the estate was much greater than it is now. There is no case of hardship if a portioner, who has a portion charged on land, is willing that it should remain unraised.

All the equitable interests were bound by the order of July 3, 1880. The subsequent order of May 17, 1882, was for a mortgage of the real estate, and the mortgagee was only concerned to see that he got the legal estate, and that the equities were bound by payment of the money into court. If it had been said that the Court had no jurisdiction to deal with the portions, we should have had to rely on s. 70 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) and *Mostyn* v. *Mostyn*. (1)

There cannot be successive mortgagees ranking pari passu. No conveyancer would suppose that there could be a mortgage subsequent to such a mortgage as this, and ranking pari passu with it. If there had been the usual term of years to secure these portions they would have been raised by mortgage of the term, and the Reynolds portion would have come last: see Davidson, vol. iii. Settlement, 3rd ed. pp. 456, 457.

At all events, the plaintiff must be entitled to priority in respect of the sum of 185*l*. 19*s*. 10*d*. advanced for enfranchisement of copyholds, and of the sum of 676*l*. 12*s*. 5*d*. advanced for payment of costs in *Muskett* v. *Muskett*.

Warrington, K.C., and *Tyssen*, for Mrs. Reynolds and her children. This case is not analogous to that of portions

(1) [1893] 3 Ch. 376.

secured by a term, where there is a trust to raise the portions "from time to time." The mortgagee has to see that the trust is duly performed, and, if the trustees do not act in accordance with the trust, he gets a defective title.

The order of Court did not, and could not, give to the mortgagee any greater right than the will gave to the persons interested in the portions charged on the real estate. The Court simply gave effect to the charges created by the will, and did not alter priorities. There is no hardship on a mortgagee in such a case. He knows what the title is, and that the mortgage is directed by the Court only by virtue of the authority given by the testator; and he knows what the nature of that authority is, and that there is a charge which will rank pari passu with his own. On the other hand, great hardship is involved in supposing that the Court deliberately intended to prefer two of the three charges over the other one.

All that the parties interested in the Reynolds portion consented to was that the other portions should be raised by a mortgage "to be settled by the judge." It is important to see what that mortgage was. We rely on the words in the operative part. The words "without prejudice, &c.," qualify the estate passing by the deed. The deed settled by the judge has preserved all the rights of those interested in the Reynolds portion.

Further, we contend that the Reynolds portion, being a debt of the testator, has priority over the Etheridge portion, which was a legacy only. A charge for a debt takes priority over a charge for a legacy. Long before simple contract creditors had as such any remedy against real estate, it was settled law that where a testator charged debts and legacies on his real estate the simple contract debts were paid before the legacies: *Kidney* v. *Coussmaker*. (1)

As to the sum of 185*l*. 19*s*. 10*d*. required for enfranchisement of copyholds, we do not contest the plaintiff's right to priority. It was a general liability of the estate, and expenditure of which all have had the benefit. As to the sum of 676*l*. 12*s*. 5*d*. advanced for costs, we submit that the mortgagee is simply in

(1) (1806) 12 Ves. 136, 154.

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the same plight with respect to that amount as he is with respect to the portions; in other words, he can add the costs of raising the portions to the amount of the portions themselves.

Peck, for the National Reversionary Investment Company. If it had been intended to give the mortgagee priority, it would have been expressed in the deed that the persons interested in the Reynolds portion consented to postpone their security.

Daniel Jones, for the Muskett family.

P. O. Lawrence, K.C., in reply. There is no ground for the argument as to priority by reason of the Reynolds portion being a debt. The principle of *Kidney* v. *Coussmaker* (1) only applies to a case where there is a general charge of debts and legacies, not to the case of specific charges. In such a case there is no authority for any such rule. It is not necessary to specify that the estate is conveyed free from charges where the person to whom the conveyance is made gets the legal estate under the order of the Court.

[On the question as to the costs, he referred to Seton on Judgments, 6th ed. vol. ii. p. 1736, citing *Michell* v. *Michell* (2) and *Armstrong* v. *Armstrong*. (3)]

Cur. adv. vult.

May 13. KEKEWICH J., after stating the facts of the case down to and including the statement of claim in the action of *Muskett* v. *Muskett*, continued:—It will be observed that the statement of claim and the decree based thereon recognised the distinction between Mrs. Etheridge's portion on the one hand and the portions of Mrs. Dashwood and Mrs. Reynolds on the other, the former being bequeathed as a legacy, and though charged on the real estate, not so charged in exoneration of the personal estate, whereas the other portions were not in any sense legacies, and were charged on the real estate in exoneration of the personal estate. It will further be observed that the statement of claim contemplated that all the portions might not then be raisable, and that provision for raising

(1) 12 Ves. 136, 154. (2) (1842) 4 Beav. 549; 55 R. R. 161.
(3) (1874) L. R. 18 Eq. 541.

those not then requiring to be raised would have to be made, and the decree gives liberty to apply in chambers for raising by sale or mortgage what was necessary for the purpose of satisfying such, if any, of the testator's debts as remained unpaid and were then raisable out of his real estate, and also what should be certified to be due in respect of the principal of such of the said portions respectively as should for the time being be raisable, together with the costs of the action.

I have referred thus fully to the statement of claim and decree because the important distinction between the portion of Mrs. Etheridge's children and the portions of the children of Mrs. Dashwood and Mrs. Reynolds escaped notice in the arguments before me, and it may lead to some further proceedings. On first recognising the importance of this distinction I thought of calling for further argument at once; but on reflection it seemed to me that further argument would be of no assistance in determining the real point now falling for decision, and that it would be better to determine that point, and leave those concerned to raise such further questions as they might be advised. Strange to say, the distinction, though apparent on the face of the decree, was immediately lost sight of, and I am afraid that this has to some extent been the cause of the present litigation. [His Lordship then stated the further facts of the case, and continued:—]

It appears from what is above set out and otherwise in the mortgage deed that Henry Joseph Muskett had incumbered his life estate, and this explains some complications in the form of conveyance; but it is really immaterial for the present purpose, and cannot in the least affect the substance of the deed or any question arising thereon. The proviso for redemption is in effect that on the principal and interest being paid the property shall be conveyed to the then subsisting uses or limitations of the will.

The plaintiff, who is not the original mortgagee, but takes his place by transfer, insists that under this deed the legal estate is vested in him. This must be so. The order of May 17, 1882, is not expressed in the form generally adopted where one is appointed to convey on behalf of others who are

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treated as trustees, but it was undoubtedly the intention of the order to vest in the mortgagee the estate of the testator, and such other estate as had been acquired under the orders of the Court; and I cannot think that the neglect to follow the prescribed forms can diminish the effect of the order, which was otherwise properly made in an action properly constituted for that purpose. The point is not, to my mind, one of much importance, but the plaintiff is so far right.

This action has been brought for the purpose of asserting the plaintiff's rights as mortgagee, and obtaining the relief to which he is entitled in that character. The serious, and indeed only, question is whether the plaintiff is first mortgagee for the sum which he advanced, or whether Mrs. Reynolds' portion of 5000*l.* will have to be raised out of the same real estate on the footing of equality. The plaintiff contends that he is entitled to priority, and that whenever Mrs. Reynolds' 5000*l.* comes to be raised by a mortgage that mortgage will be subject to his, so that the new mortgage will be a second charge which the property may be unable to bear.

The defences of those interested in Mrs. Reynolds' portion raise a point which I have found some difficulty in appreciating. They say, as I understand them, that because Mrs. Reynolds' and Mrs. Dashwood's portions were debts, and one defence adds specialty debts, therefore they are in a better position as regards priority of charge on the real estate than Mrs. Etheridge's portion, which was mere bounty, and that, therefore, Mrs. Reynolds' portion must rank pari passu with Mrs. Dashwood's portion; and they seek to impeach the plaintiff's claim of priority in this manner and to this extent. In the general administration of the testator's real and personal estate, for which the assistance of the Court has not yet been invoked, this distinction between Mrs. Etheridge's portion on the one hand and the other two portions on the other (not, be it observed, the same distinction as that to which I have called attention in an earlier part of this judgment) may be of importance, and may give rise to some nice questions; but for the present purpose we are only considering how and in what order the several portions are charged on the real estate by the

will, and are raisable by reason of that charge, and we are not at all concerned with the fact that some or all of the portions might, for other purposes and in some other proceedings, have been directed to be raised independently of that charge, and raised accordingly.

In what has been just said I have really decided the main question. Not only is the mortgage expressly made without prejudice to any charge which might be subsisting on the real estate under the will, but the whole form and substance of it go to shew what undoubtedly must be the fact, that the whole object of the Court in sanctioning and directing that mortgage was to give effect to the testator's directions respecting certain charges on his real estate, so far as it was then convenient to give effect to them, without for a moment ignoring whatever other charges he might have created thereon. The action was, as already remarked, properly constituted for the purpose of clearing the real estate, but it was not competent to the Court in such an action to do more than investigate the charges on the real estate created by the testator's will, and to provide for them as occasion required. This is the tenor of all the proceedings, including the order of May 17, 1882. It is also the tenor of the mortgage deed itself. It may be that, looking back with subsequently acquired knowledge, we can say that it would have been better to raise all the portions at one and the same time; but this is quite a different thing from saying —and we are not entitled to say—that the Court in fulfilling the testator's directions, which was its only duty, intended to place two of the portions in a better position than the third, or, in other words, to give the mortgagee a charge for the two in priority to the third, which was from the first equally entitled to a like charge under the will. Nor can the mortgagee or the plaintiff claiming through him complain, because even if the mortgagee did not know for certain—as perhaps he did not, although it was a fact—that the third portion would ultimately have to be raised, yet he did know that it would be a charge if there were children of Mrs. Reynolds to claim it, and that at least there were children in existence entitled in expectancy. In my judgment, therefore, the plaintiff can only claim a

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charge on the real estate for the two sums of 5000*l.* pari passu with the third sum of like amount, and this notwithstanding that the third sum is at present only charged in equity by virtue of the will, whereas the plaintiff has a legal mortgage sanctioned by the Court. To put it in other words, he cannot claim priority by reason of his legal mortgage as against another charge of equal rank in equity, of which he had express notice, and subject to which he accepted his mortgage.

Having regard to the many possible questions which may have to be argued and worked out, in order to give all parties their equitable rights (if in truth they can now all be secured in full), I think it better not only to content myself with deciding the one question of law which was the subject of argument before me, but further to suggest that before anything further is done it would probably be better for the parties interested to consider their respective positions, and to take an opportunity of ascertaining the facts hitherto not brought into prominence, and, so far as I am aware, not yet ascertained, which are necessary to a correct view of these positions. Obviously, for instance, it is impossible to adjust the rights of the parties without inquiring into the administration of the personal estate, about which I know nothing beyond what is mentioned in the statement of claim quoted above.

But there are two subordinate questions which were discussed and can conveniently be disposed of. It has been mentioned incidentally that a sum of 185*l.* 19*l.* 10*d.* was required to carry out the enfranchisement of certain copyhold lands subject to the uses of the will. This was added to the sum which the mortgagee advanced, and was paid by the order of the Court to the lord of the manor for such enfranchisement. It is agreed on all hands that all parties interested in the real estate have had and will have the benefit of the enfranchisement, and that it was necessarily raised for this purpose. There can be no question but that the plaintiff is entitled to priority as regards this sum. The mortgagee also advanced the sum of 676*l.* 12*s.* 5*d.*, the amount of the costs of the action of *Muskett* v. *Muskett*, including the costs of the mortgage itself, which costs were by the order of May 17, 1882, directed to be taxed

and paid to the persons entitled to receive the same. About the position, as regards the other incumbrances, of this sum there was some discussion, and it was urged for the plaintiff that he is entitled to priority as regards this sum also. It is quite settled—see *Armstrong* v. *Armstrong* (1)—that trustees who have power to raise a certain sum by mortgage for the benefit of a particular person or class of persons have also by implication power to raise the incidental costs by mortgage of the same property, and, if and whenever it becomes necessary to resort to the Court for the purpose of enforcing and raising a charge, it is the established rule that the costs of the proceedings are also raised as an addition to the original charge. There may, of course, be cases in which there has been litigation in the strict sense of the word, the costs of which the Court may hold to be payable either wholly or partially by those who are responsible for the litigation; but where the proceedings are of an administrative character the general rule obtains as to the entire costs of such proceedings. Any other result would be unjust to those entitled to the benefit of the charge, who would get, not what the testator has provided for them, or which has been secured by some bond or covenant, but only that sum less costs, which might amount to a considerable deduction. Cases dealing with a different character of administration need not be noticed, for the proceedings in *Muskett* v. *Muskett* clearly belong to the general class above indicated.

It may hereafter be necessary to distribute the costs of that action, including the costs of the mortgage, between the portions of Mrs. Etheridge and Mrs. Dashwood; but it is clear to my mind that, regarding the mortgage as a whole, the costs are attached to the aggregate sum of 10,000*l.*, and the plaintiff is entitled to the same priority as regards the costs as he is entitled to as regards the principal sum, and no more or less.

Solicitors: *Pasco Daphne; J. M. Yetts; Grundy, Izod & Co.; Iliffe, Henley & Sweet.*

(1) L. R. 18 Eq. 541.

C. C. M. D.

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DUDER *v.* AMSTERDAMSCH TRUSTEES KANTOOR.

[1901 D. 2309.]

Practice—Jurisdiction — English Contract — Foreign Defendant — Assets in Foreign Country—Receiver—Service out of the Jurisdiction—Necessary or proper Parties—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*g*).

Since the Court has the same jurisdiction with regard to any contract made, or equity between, persons in this country, respecting lands or assets in a foreign country, as it has where the lands or property are situate in England, to allow service of the writ out of the jurisdiction in a case within the terms of Order XI., r. 1 (*g*), is not to extend the jurisdiction, but to enable the old jurisdiction to be exercised in cases where formerly this jurisdiction could not have been exercised by reason of defective rules of procedure.

In an action against (1.) a Dutch corporation, trustees of a debenture deed, (2.) the receivers appointed under this deed, resident in England, and (3.) an English company having property and assets in Brazil, to enforce an alleged prior equitable charge, made in England, upon property and assets in Brazil, and now vested in the first defendant:—

Held, that as the first defendants were necessary and proper parties to the action, within the terms of Order XI., r. 1 (*g*), and that as the Court had jurisdiction to grant the relief asked, service of the writ on the first defendant ought to be allowed; and, on the application of the plaintiffs, a receiver of the assets in the debenture deed was also appointed.

MOTION.

The object of this action was to enforce an alleged prior equitable charge, made in England, on property and assets in Brazil; one of the defendants was a Dutch corporation, and the questions raised by this application were, whether service of notice of the writ of summons in this action on this Dutch corporation ought to be allowed under Order XI., r. 1 (*g*), and, incidentally, whether there was jurisdiction to grant the relief asked for in the action.

The plaintiffs were a Brazilian firm, carrying on business in Bahia; one of the members of the firm, George Harvey Duder, who was also legal personal representative of his father, George Harvey Duder the elder, was resident for the time being in England. The defendants were: (1.) the trustees of a debenture deed, the Amsterdamsch Trustees Kantoor, a Dutch

company incorporated according to the laws of Holland, but having no place of business or assets in England; (2.) the receivers already appointed under the debenture deed, Messrs. Swales and Campbell, who were resident in England; and (3.) the Bahia Central Sugar Factories, Limited, an English company having assets and property in Brazil. George Harvey Duder, the elder, deceased, had for many years acted as agent in Bahia for the Bahia Central Sugar Factories, Limited, and on his death was succeeded by the plaintiffs, who carried on the agency up to the end of the sugar-cane crop for the years 1900–1901, and there were various claims in respect of this agency against the Bahia Company for money advanced from time to time for the purposes of the company by their agents. The material portions of the deeds under which the plaintiffs' alleged prior equitable charge was created on the property and assets of the Bahia Company were as follows:—

By an indenture of September 25, 1894, which was a debenture trust deed in English form for securing first mortgage debentures, and was made between the defendants the Bahia Company of the one part, and the defendants the Amsterdamsch Trustees Kantoor of the other part, the company as beneficial owners purported to convey to the defendants, the Amsterdamsch Trustees Kantoor, certain freehold hereditaments at Rio Fundo and Iguape, in the State of Bahia, to the use of the trustees in fee simple, and to assign to the same trustees the benefit of a Brazilian Government guarantee; it was also provided that the company should when required do all acts and things necessary to give effect to the deed according to Brazilian law. All the property so conveyed and assigned was to be held by the trustees as security for the payment of the principal money and interest secured by the mortgage debentures, which were to constitute a fixed first charge. There were also provisions enabling the trustees in the events (one or more of which had arisen) to enter upon and take possession of the mortgaged premises and to sell and convert the same; and by clause 10, after entry, and until the whole of the mortgaged premises should have been sold and converted under the primary trust for conversion, a

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power was conferred upon the trustees, if and when they should think fit (inter alia), "to carry on the business of the company, or any part thereof, in and with the mortgaged premises, or any of them, and manage and conduct the same as they in their discretion should think fit, and for that purpose to make or procure advances, and secure the same with interest at a rate not exceeding 10 per cent. per annum by mortgage or charge in priority, or subsequent to, the principal moneys and interest secured by the mortgage debentures or otherwise as might be thought expedient." By clause 12 the trustees were empowered to appoint receivers with very large powers, and in particular with power to exercise all or any of the powers conferred by clause 10, and also power to sell all or any part of the mortgaged premises.

By clause 16 it was provided that all the moneys to arise under the primary trust for conversion, and all moneys received under any of the powers conferred upon the receivers, should, so far as the Brazilian law did not provide to the contrary, be held by the trustees, or by the receivers receiving the same, subject to the repayment of any advances made or procured to be made, by the trustees or the receivers, for the purpose of carrying on the said business, upon trust to apply the same as therein provided; and clause 36 provided that the deed was "intended to constitute and operate as an English contract to be construed according to English law."

The debentures secured by the last-named deed purported to charge all the undertaking of the company and all its assets, both present and future, as a first charge on the premises at Rio Fundo and Iguape, on the guarantee and concession, and as a floating charge on all other assets of the company.

The defendants Swales and Campbell were subsequently duly appointed receivers under the powers of the trust deed, and by deed dated July 13, 1899, and made between the defendants the Amsterdamsch Trustees Kantoor of the first part, the defendants Swales and Campbell of the second part, and George Harvey Duder the elder (since deceased), but then a member of the plaintiffs' firm, of the third part, and expressed to be supplemental to the deed of September 25, 1894, after

reciting that for the purpose of carrying on the business of the company the trustees and receivers had entered into the agreements thereinafter contained, it was agreed that the said G. H. Duder should provide 2000*l.* as therein mentioned, and pay it to the credit of the receivers at a named bank. There were also provisions for interest, for the financing of the company by G. H. Duder for the crop 1899 and 1900, who was to advance the necessary amounts for working expenses and in payments for sugar-canes.

By clause 5 G. H. Duder was appointed agent of the receivers for the management of the crops, and was to have the sole privilege of selling the produce and receiving the net proceeds, and at the end of the crop to pay to the receivers, or to their order, the profits that might be made, or should there be a loss, such loss was to be a charge upon the factories and other assets of the company in favour of the said G. H. Duder in priority to the first or other debenture-holders; and interest was to be calculated and settled quarterly at the rate of 10 per cent. per annum.

By clause 9 it was provided as follows: "All moneys payable or due hereunder to or on account of the said G. H. Duder shall be and are hereby charged upon all the mortgaged premises as defined by the principal indenture, and all the undertaking of the company, and all its assets, both present and future, such charge to rank in priority to the principal moneys and interest secured by the principal indenture, or the mortgage debentures as defined by the same indenture."

By deed dated August 21, 1900, and made between the defendants the Amsterdamsch Trustees Kantoor of the first part, the defendants Swales and Campbell of the second part, and G. H. Duder, described as a partner of, and, for the purposes of that deed, representing the plaintiff firm, of the third part (this deed being also described as supplemental to the deed of September 25, 1894), after reciting that for the purpose of carrying on the business of the Bahia Company the trustees and receivers had entered into the agreements with the plaintiff firm thereinafter contained, it was agreed that the plaintiff firm undertook to continue to finance the Bahia Company for the

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crop 1900 and 1901, advancing the further necessary amounts for working expenses and in payment for sugar-canes, all such advances to be placed to the debit of the receivers. The deed contained other provisions similar to those contained in the last-mentioned deed, and by clause 5 it was agreed that all moneys payable or due thereunder, to or on account of the said G. H. Duder & Co. in respect of advances made by them for account of the company since they took over the business of the said G. H. Duder, deceased, and advances to be made by them, should be, and the same were, thereby charged upon all the mortgaged premises as defined by the principal indenture and all the undertaking of the company, and all its assets, both present and future, such charge to rank in priority to the principal moneys and interest secured by the principal indenture, or the mortgage debentures as defined by the same indenture, but subject to the claims (if any) of G. H. Duder, deceased, under the said indenture of July 13, 1899.

The above-mentioned securities were alleged by the defendants to be defective and inoperative in Brazil by reason of non-compliance with some of the requirements of Brazilian law; but, on the other hand, the plaintiffs had been advised that a receiver appointed by an English Court would be recognised by the Brazilian Courts, after certain formalities for legalising his appointment in Brazil, and would thereupon be able to act and to sue and be sued in accordance with the English order appointing him and with the Brazilian law.

By the writ in this action the plaintiffs claimed a declaration that, under or by virtue of the two deeds of July 13, 1899, and August 21, 1900, they, or some or one of them, were entitled to a charge upon the freehold hereditaments and other mortgaged premises comprised in the said debenture deed of September 25, 1894, and upon the undertaking of the defendants the Bahia Central Sugar Factories, Limited, and all its assets, present and future, for securing moneys due, an account of what was due, enforcement of the charge by foreclosure or sale, and a receiver.

The plaintiffs now moved for the appointment of a receiver of the property and assets of the Bahia Company comprised in

the debenture deed; there was a cross-motion by the first defendants, the Amsterdamsch Trustees Kantoor, to set aside the writ to which they had appeared under protest, and it was on this motion that the main argument proceeded, it being agreed that this should be dealt with as if leave had been given to the plaintiffs to serve notice of the writ abroad (which would have been the ordinary method of procedure), and this was an application to discharge the order giving leave.

It appeared in the course of the hearing that there was other litigation by debenture-holders, to which the first defendants were parties, which is shortly referred to in the judgment, but which is not otherwise material for the purposes of this report.

Levett, K.C., and *Stokes*, for the first defendants. The Bahia Company could not delegate their borrowing powers to the trustees of the debenture deed; consequently the first defendants, as trustees, could not give a valid charge on the assets in their hands. The plaintiffs' claim is therefore based on an invalid charge, apart from any question of its invalidity for want of registration in Brazil, and they seek to enforce this charge on property and assets in Brazil against these defendants, who are a Dutch corporation having no place of business or assets in England. The rights sought to be enforced can only be properly determined and enforced by the Courts of Brazil. The Court has no jurisdiction to enforce, against land in a foreign country, a security which has no validity by the law of that foreign country; neither can it entertain an action for the determination of the title, or the right, to the possession of immovable property situate out of England: Dicey's Conflict of Laws, p. 214; *Norris* v. *Chambres* (1); *In re Hawthorne*. (2) It is only by operating in personam and not in rem that the Court makes any order respecting property situate out of the jurisdiction: and there is no precedent for the exercise of the jurisdiction in personam unless the defendant, against whom relief is sought, is within the jurisdiction.

(1) (1861) 29 Beav. 246. (2) (1883) 23 Ch. D. 743.

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Assuming that this case is within the terms of Order XI., r. 1 (*g*), it is useless to give leave to serve the writ on these defendants, when there is no jurisdiction to grant against them the relief sought in this action. If the only remedy is in rem situate abroad, proceedings to enforce this remedy must be taken abroad. [*Paget* v. *Ede* (1), *Colyer* v. *Finch* (2), and *In re Anglo-African Steamship Co.* (3), were cited.]

Rowden, K.C., and *M. Romer*, for the plaintiffs. We do not admit that our charge is not a valid one; if we can enforce our claim here, by obtaining the appointment of a receiver, we shall be able to enforce our title in Brazil also: the appointment of a receiver by the English Court will be recognised, after certain formalities, in Brazil. In *Bawtree* v. *Great North-West Central Ry. Co.* (4), where the plaintiffs' charge on Canadian property was denied and their security impeached, leave to serve on the defendants out of the jurisdiction was granted. That case is precisely in point. The present defendants are "necessary and proper" parties, and service ought to be allowed. The Court has jurisdiction to grant relief by appointing a receiver and ordering the defendants to assist the receiver: *Penn* v. *Lord Baltimore* (5); *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan and Agency Co.* (6)

With regard to a contract made, as this charge was, in English form, between persons some of whom were in this country, respecting lands in a foreign country, the Court has the same jurisdiction as if they were situate in England. [*British South Africa Co.* v. *Companhia de Moçambique* (7) and *Ex parte Pollard* (8) were referred to.] In *Norris* v. *Chambres* (9), and some of the other cases relied on by the defendants, the relief asked was not founded on contract. The Court can appoint a receiver over property out of the jurisdiction; by acting in personam it treats as guilty of contempt any party to the action in which the order is made who

(1) (1874) L. R. 18 Eq. 118.
(2) (1856) 5 H. L. C. 905.
(3) (1886) 32 Ch. D. 348.
(4) (1898) 14 Times L. R. 448.
(5) (1750) 1 Ves. Sen. 444.
(6) [1892] 2 Ch. 303.
(7) [1893] A. C. 602.
(8) (1840) Mont. & Ch. 239.
(9) 29 Beav. 246.

prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country: *In re Maudslay, Sons & Field.* (1)

Levett, K.C., in reply. It is admitted that the main object of this action is to enforce the plaintiffs' equitable charge; the Court cannot make a declaration affecting land in a foreign country, and has no jurisdiction to bring a foreigner here in order to act in personam. There is no power to enforce any order against these defendants in Holland. In *Bawtree* v. *Great North-West Central Ry. Co.* (2) the validity of the charge was sub judice in Canada, whereas here the validity of the charge is disputed, and is admittedly not yet effective in Brazil.

Cur. adv. vult.

April 29. BYRNE J. In this case there are cross-motions, one, by the defendants the Amsterdamsch Trustees Kantoor (a Dutch company incorporated according to the laws of Holland, having no place of business or assets in England), to set aside the writ to which they have appeared, saving their rights; and the other, by the plaintiffs, for the appointment of a receiver.

It was agreed that the defendants' motion ought to be dealt with as though leave had been given to serve notice of writ abroad, and this were an application to discharge such order.

I think that the case falls within the terms of Order XI., rule 1 (*g*), as the defendants, the trustees, are necessary or proper parties to an action properly brought against other persons properly served within the jurisdiction; but, nevertheless, the application ought not to succeed, if, as is contended, the Court has no jurisdiction to grant the relief asked for in the action.

The substantial points taken on behalf of the defendant applicants are that they are a Dutch company having no place of business or assets in England, that the action relates exclusively to immovable and movable property in the Republic of Brazil or elsewhere out of the jurisdiction, and that the rights sought to be enforced can only be determined and enforced by

(1) [1900] 1 Ch. 602. (2) 14 Times L. R. 448.

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the Courts of Brazil. [After stating the nature of the relief claimed by the writ, and the material portions of the deeds under which the plaintiffs' charge was alleged to have been created, as set out above, his Lordship continued:—]

If the defendants the Amsterdamsch Trustees Kantoor were resident in England, I should entertain no doubt that the plaintiffs would be entitled to enforce their equitable charge against them, although the security were proved to have no operation in Brazil. The case of *Ex parte Pollard* (1) is in point. In that case an equitable mortgage was given in English form, of lands in Scotland, by memorandum and deposit of Scottish title-deeds. The mortgagors were partners who carried on business in England and in Scotland, and they subsequently became bankrupts. It was proved that by the law of Scotland no lien or equitable mortgage was created by the deposit or memorandum in question. The creditor sought to establish his right to be treated as having a charge in the bankruptcy, and Lord Cottenham L.C. upon appeal upheld his contention, and in giving judgment he says (2): "The special case also finds that the deposit and agreement does not by the law of Scotland create any lien or equitable mortgage upon the estate. By this statement of the law of Scotland, which, sitting here, I must consider as a fact, I am bound, but so far only as the statement goes, and that does not find any thing contrary to the well-known rule, that obligations to convey, perfected secundum legem domicilii, are binding in Scotland, but that by the law of Scotland no lien or equitable mortgage was created by the deposit and agreement; by which must be understood that the law of Scotland does not permit such deposit and agreement to operate in rem, and not that they may not give a title to relief in personam. It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings in personam, which Courts of Equity here are constantly in the habit of doing: not thereby

(1) Mont. & Ch. 239. (2) Mont. & Ch. 250.

in any respect interfering with the lex loci rei sitæ. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

Then, after referring to *Penn* v. *Lord Baltimore* (1), *Lord Cranstown* v. *Johnston* (2), and *Scott* v. *Nesbitt* (3), he continues: "Bills for specific performance of contracts for the sale of lands, or respecting mortgages of estates, in the colonies and elsewhere out of the jurisdiction of this Court, are of familiar occurrence. Why then, consistently with these principles and these authorities, should the fact, that by the law of Scotland no lien or equitable mortgage was created by the deposit and memorandum in this case, prevent the Courts of this country from giving such effect to the transactions between the parties as it would have given if this land had been in England? If the contract had been to sell the lands a specific performance would have been decreed; and why is all relief to be refused because the contract is to sell, subject to a condition for redemption? The substance of the agreement is to charge the debt upon the estates, and to do and perfect all such acts as may be necessary for the purpose; and if the Court would decree specific performance of this contract, and the completion of the security according to the forms of law in Scotland, it will give effect to this equity by paying out of the proceeds of the estate (which being part of the bankrupt's estate must be sold) what is found to be the amount of the debt so agreed to be charged upon it, which is what the creditor asks."

In *British South Africa Co.* v. *Companhia de Moçambique* (4)

(1) 1 Ves. Sen. 454.
(2) (1796) 3 Ves. 170, 182; 3 R. R. 80.
(3) (1808) 14 Ves. 438, 442; 9 R. R. 318.
(4) [1893] A. C. 602.

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the defendants Swales and Campbell have been appointed receivers on behalf of the plaintiffs, and in which judgment has already been obtained declaring charges in favour of first and second mortgage debenture-holders, and directing, amongst other inquiries, an inquiry what other incumbrances affect the property comprised in or charged by the deed of September 25, 1894, and another deed dated June 8, 1897, and the first and second mortgage debentures respectively; an account of what is due to such other incumbrancers respectively, and an inquiry what are the priorities of such other incumbrances, and the said indentures of September 25, 1894, and June 8, 1897, and the first and second mortgage debentures respectively, and what property, other than that comprised in the said indentures and debentures respectively, is comprised in such other incumbrances.

That judgment has been, or will in due course be, served upon the plaintiffs in the present action, and they can either then come in and attend the inquiries, or stand aloof from those proceedings altogether, relying on their present claim to a prior charge, and to their remedies in respect of it. It seems they consider, and perhaps rightly, that it is more to their interest to insist on their right outside the debenture-holders' action, and to ask for the appointment of a receiver in this action. I think they have made out a primâ facie right to a prior charge, as against the defendants, by virtue of their English contract, although there may be reasonable controversy both as to the extent of property to which it extends, and as to the amount due upon it. Under these circumstances I think that they are entitled to the appointment of a receiver of so much of the property as is clearly within their contract; but it would be probably so inconvenient and detrimental to the property to appoint a separate receiver, that I think it would be right to appoint the defendants Swales and Campbell to act as receivers for the plaintiffs in this action if they are willing to do so. The motion of the defendants must be dismissed with costs, and the costs of the plaintiffs' motion will be costs in the action.

Solicitors: *Sutton, Ommanney & Rendall; Lyne & Holman.*

W. C. D.

DUKE OF NEWCASTLE *v.* WORKSOP URBAN DISTRICT COUNCIL.

FARWELL J.

1902

March 12, 13, 14, 15, 24.

[1900 N. 1178.]

Franchise—Fair—Market—Fair and Market held on same Day—Merger—Change of Days for which Charter granted—Tolls—Stallage.

The plaintiff, as lord of the manor of Worksop, was owner of a weekly provision and cattle market (held on Wednesdays) and two annual fairs granted by ancient charters with right of toll. The defendants were lessees of the markets under a lease granted in 1851 for ninety-nine years. This lease expressly excepted and reserved the fairs. In 1845 the then lord of the manor had, without licence from the Crown, changed the days of holding the fairs from March 21 and October 2 and 3, the days named in the charter, to the second Wednesdays in March and October. Until the date of the lease the markets and fairs were held in the streets. After that date the markets were held in buildings or on land provided by the defendants or their predecessors in title. On the two new fair days the fair was duly proclaimed by the crier of the lord, but nothing further was done by the lord. On these fair days the defendants charged an increased toll for stalls in the market to persons who only attended on fair days, but allowed regular attendants at the market to have stalls at the usual market rate. The defendants had also issued lists of tolls shewing an increased toll on fair days for "lots" of eggs, but this had not been collected. The plaintiff brought this action for an account of all tolls received by the defendants on fair days on the ground that they were fair tolls and not market tolls. It appeared that tolls were taken at the fair in the reign of Edward III., but there was no evidence of the payment of any fair tolls between that date and the date of the lease:—

Held, that there is no impossibility in holding a market and a fair in the same manor on the same day, and no presumption that the market is absorbed in the fair; that, though the change of days did not of itself forfeit the franchise of the fair, the lord could not legally recover tolls on days not named in the charter; that the increased tolls charged by the defendants on fair days were stallage payable to them as owners of the soil; that the owner of a fair or market, so long as he does not charge unreasonable tolls, is not bound to charge all persons alike, but may remit part of the toll to favoured persons; and that the parties had contracted for the lease upon the basis that no fair tolls were payable.

By a charter dated in the 24th year of Edward I. the King granted, among other things, "To our beloved and faithful Thomas de Furnivall that he and his heirs for ever may have

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one market in every week on Wednesday at his manor of Wyrkesop in the county of Nottingham and one fair there in every year to last eight days that is to say on the eve and on the day and on the morrow of St. Cuthbert the Bishop (March 20th) and on the five days following."

In the 3rd year of Edward III. Thomas de Furnivall was summoned to answer quo warranto he held a market and a fair. He answered by claiming a prescriptive right, and also set up the charter of Edward I. It was answered for the King, that Thomas had abused certain of the liberties by taking from persons coming to the fair and market superfluous tolls. The jury found that Thomas was entitled to the market and other liberties aforesaid, but had abused the said market and fair, because he had always taken twopence as toll "de quacunque re venali emptâ vel venditâ ibidem in mercato sive feriâ," whereas before his time there was not wont to be taken but one penny; therefore the aforesaid liberties were taken into the hands of the Lord the King, but they were granted again to Thomas on payment of a fine of 20*l*.

This charter was confirmed by inspeximus in the 9th year of Richard III.

On December 7, in 13 Chas. 2, the King by charter granted to Henry Howard of Norfolk, then lord of the manor of Worksop, his heirs and assigns, "That he his heirs and assigns shall and may be able to have hold and keep one market in and upon every Wednesday in every week through the year at the town of Worksop To be holden for the buying and selling of all kind of beasts and cattle, together with the ancient market there, in and upon the same day in times past usually holden . . . . and also three new fairs or markets every year at the same town of Worksopp . . . . to be holden the first of the same fairs and markets upon the 21st day of March, the second upon the 21st and 22nd days of June, and the third in and upon the 3rd and 4th days of October in every year . . . . also a separate court of pie powder, together with all liberties and free customs tolls tollage stallage piccage fines amerciaments and all other profits advantages and emoluments whatsoever to such market fairs or marts and court of pie powder pertaining."

By a lease dated November 11, 1851, and made between Charles Pelham Clinton of the one part and five trustees for a joint stock company then recently incorporated under the name of the Worksop Nottinghamshire Corn Exchange and Market Company of the other part, after reciting that Charles Pelham Clinton, being lord of the manor of Worksop, was entitled to the tolls and all other the market dues receivable and payable at the market held in the town of Worksop subject to certain mortgages; and that it was intended to remove the said market from the open street in the said town of Worksop where the same was then held into or within the market-house and ground then erected and inclosed for that purpose by the said company; the said Charles Pelham Clinton and his mortgagees demised to the trustees "all those tolls stallage piccage and all and singular other the market dues now receivable and payable at the market held in the town of Worksop belonging to the said Charles Pelham Clinton or his said mortgagees. And also all that the right and power of appointing the clerk of the said market from time to time and all profits benefits advantages emoluments appendances and appurtenances whatsoever to the said premises belonging or in anywise appertaining (but excepted always out of the aforesaid grant or demise and reserved unto the said Charles Pelham Clinton his mortgagees heirs and assigns all fairs courts perquisites of courts royalties jurisdictions franchises and other manorial rights whatsoever other than the said tolls and premises hereinbefore granted or demised to the said market belonging for a term of ninety-nine years at a yearly rent of 5*s*.)"

The lease contained covenants by the trustees to do all things necessary to procure the removal of the market to the market-house and ground of the company, to hold the market there during the term, and to do nothing whereby the charter might be forfeited or the right of the said C. P. Clinton to the market dues and premises might be prejudiced or affected.

In 1882 this lease was assigned by the company to the defendants' predecessors, the Worksop Local Board. The reversion expectant thereon had become vested in the plaintiff.

This action was brought for an account of fair tolls belonging

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to the plaintiff under the reservation in the lease alleged to have been received by the defendants.

The judge found the following state of facts to have been proved:—

Both markets had been held regularly every week, in former years in the streets, but after 1851 the provision market was held in the Corn Exchange Town Hall and Market Square (all of which belonged to the defendants, or their predecessors in title, in fee), and the cattle market was held in a field called Shaw's Field. This field belonged to the plaintiff, but had been leased by his predecessors in title to various lessees in succession, and finally in 1878 to the company aforesaid for twenty years. This lease had been assigned to the defendants, and on its expiration the plaintiff had conveyed to the defendants a piece of land in Worksop for the purpose of erecting thereon a market. The defendants had erected a market and held their cattle market therein.

Two of the fairs granted by the charters, namely, those to be held on March 21 and October 3 and 4, were duly held on those days until 1845, when the plaintiff's predecessor changed the days for holding these two fairs to the second Wednesday in March and the second Wednesday in October. No new charter or licence had been obtained for this change. It was made by a simple notice given by the then lords of the manor and advertised in the local papers. It was said that the inhabitants had requested this change by resolution passed in public meeting; but of this there was no admissible evidence. The fairs were duly proclaimed on every fair day by the crier of the lord of the manor in compliance with the statute of Northampton, 2 Edw. 3, c. 15; but there was no evidence that any fair tolls had ever been paid since the 3rd year of Edward III. under the first charter, or at any time under the charter of Charles II. The lord had never appointed any collector of tolls, nor provided any buildings or ground for holding the fair, nor any stalls or pens, nor held a court of pie powder, or appointed any one to settle disputes, nor in short done anything whatever except proclaim the fair.

The fairs were in fact held at the same time and place as the

Wednesday market. The defendants had received all tolls on fair days as on other market days; but on June 16, 1892, they had published a list of tolls to be taken in the provision market containing the following items: "Stalls in market yard, Wednesday and Saturday, per lineal foot, 2*d.*; ditto, fairs and statutes, 6*d.*; eggs, per lot, 3*d.*; ditto, fairs and statutes, 6*d.*" The 6*d.* toll on eggs had never been taken; for stalls the defendants had charged 1½*d.* (not 2*d.*) per foot on ordinary market days, and on fair days had charged 1½*d.* to old customers, i.e., persons who frequented the market, but 3*d.* to new customers, i.e., persons who came in on fair days only. Regular frequenters of the market who brought eggs or other provisions in baskets were allotted seats by the defendants' officer, and practically always went to the same places.

Haldane, K.C., *Butcher, K.C.*, and *Vaughan Hawkins*, for the plaintiff. It is plain that fairs have been regularly held, for they have been proclaimed; and as fairs are expressly excepted from the lease to the defendants, they must account for all fair tolls they have received. The defendants suggest that the plaintiff's franchise has been forfeited, but there is no ground for this contention. A change of place within the precincts of the franchise is within the powers of the lord: *Curwen* v. *Salkeld.* (1)

The change of day on which the fair was held may be a ground for forfeiture by the Crown; but no one else can take advantage of it: *Lord Midleton* v. *Power* (2); and as the Crown have not interfered for fifty years, the presumption is that a licence has been given. In *Great Eastern Ry. Co.* v. *Goldsmid* (3) there was a question whether a market was held under a charter of Charles II. or one of James II., which were for different days, and Lord Blackburn's judgment treats it as immaterial under which it was held, though the days would have been changed if it had been held under the later charter.

[FARWELL J. referred to *Attorney-General* v. *Horner.* (4)]

(1) (1803) 3 East, 538; 7 R. R. 510.
(2) (1886) 19 L. R. Ir. 1.
(3) (1884) 9 App. Cas. 927.
(4) (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66.

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In any case the plaintiff's franchise is perfectly good against every one except the Crown. If he had granted the defendants a right to hold their market on a fair day, he might be estopped from saying they could not hold it on a fair day, but he has excepted his fair; so they can only hold a market, so as not to interfere with his fair.

It is impossible that the defendants' market should absorb the plaintiff's fair. Markets and fairs are defined by Gunning: "A fair is a great sort of market, granted to any town, &c., for buying or selling, and for the more speedy or commodious provision of such things as the subject needs; and it is usually kept once or twice in the year.

"A market is less than a fair, and granted to a town, &c., for the like purposes, but chiefly for the provision of such victuals as the subject wants; it is usually kept once or twice in the week.

"Every fair is a market, though every market is not a fair; and, therefore, where a statute, &c., speaks of a fair, a market shall be also comprehended": Gunning on Tolls, p. 44. The last paragraph is cited from Coke's 2nd Inst. 406.

It is not necessary to say that the market is merged in the fair, but to hold them both at the same time and place is physically impossible. The fair must be held on the right day. A market cannot be held on the same day without interfering with the fair. It follows that the market being the less cannot be held. There is no direct authority on the point. But the right of fair is an exclusive right of selling at that time and place: see *In re Islington Market Bill* (1) and *Mosley* v. *Chadwick* (2), where Lord Mansfield cites all the older authorities.

A market held on a fair day would be a disturbance of the franchise of fair, and as the lease excepts fairs it does not justify such a disturbance, but must be construed as giving the defendants a right to hold the market on every Wednesday except fair days.

Both markets and fairs are franchises, and, though their

(1) (1835) 12 M. & W. 20, n.; 3 Cl. & F. 513; 39 R. R. 32.

(2) (1782) 7 B. & C. 47, n.; 31 R. R. 150, n.

origin was probably very different, there is now no legal difference between them except in size. (See Report of the Commission on Market Rates and Tolls, of which Mr. Elton was chairman. (1))

The tolls taken on a fair day must be all attributable to the fair. There could not be both market tolls and fair tolls payable for the same selling. The lists of tolls from time to time issued by the defendants shew that they were levied on everything brought into the fair. They must, therefore, have been fair tolls, not stallage, which is a payment for the use of a defined space of ground: *Reg.* v. *Casswell.* (2)

The defendants were not rated on these tolls. That proves that they were fair tolls, not stallage.

The fair was originally a fair with toll. It is not necessary to prove that the lords actually received tolls. Mere non-collection of tolls could not forfeit the right or alter the character of the franchise.

[FARWELL J. Is there any evidence that tolls were paid before 1851? If not, must I not presume a surrender to the Crown?]

The tolls are appurtenant to the fair. It is impossible to presume a surrender of the tolls to the Crown leaving the franchise fair in the lords of the manor. If the tolls were forfeited they would still continue to exist, and the Crown could collect them.

Upjohn, K.C., and *Herbert Chitty*, for the defendants. The question in this case is much more important to Worksop than the mere amount of the tolls. If the market on these two Wednesdays is a fair, then it is a fair held on a wrong day, i.e., not a legal fair, and every one selling at it is liable to the penalties imposed on unlicensed hawkers: *Benjamin* v. *Andrews.* (3) And questions would arise as to the passing of the property in goods sold. In *Lee* v. *Bayes* (4) there is a dictum of Jervis C.J. that market overt must be "an open and legally constituted market."

(1) Parliamentary Papers, 1888, vol. liii.
(2) (1872) L. R. 7 Q. B. 328.
(3) (1858) 5 C. B. (N.S.) 299.
(4) (1856) 18 C. B. 599.

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The defendants have never disputed the plaintiff's right to hold a fair, but he has no right to hold it on the defendants' land. If he holds it in the streets on the second Wednesdays in October and March, he may be restrained by injunction at the instance of the Attorney-General: *Attorney-General* v. *Horner* (1); but the defendants cannot complain.

If the fair has been held on those days on my land with my consent, I had a right to charge stallage. Stallage is payable to the owner of the land, not to the owner of the fair. It is payment to the owner of the land within the fair for user of a piece of the land as distinguished from mere entry. An action to recover stallage is really an action for use and occupation. Erecting a stall in a market is not of common right, and the proper remedy is trespass: *Northampton Corporation* v. *Ward*. (2)

The word toll is used in two senses—a generic sense, which includes toll proper, stallages, piccages, groundages, and so forth, and in a specific sense. In this sense market toll proper is a toll payable to the lord of the market on a sale within the market of things tollable brought into the market and there sold. This is payable by the buyer.

Stallage we have already mentioned. Piccage is a duty for picking holes in the lord's ground for the posts of the stalls. It belongs to the owner of the soil.

There is another thing, which perhaps comes nearest to the evidence in this case, which is called "standing" or "groundage," where the seller has a special place for his standing, though he erects no stall. In the oldest authority it is said to be "pour son lieu et (3) son standing": Brooke, Abr., tit. Tolle, pl. 2.

Definitions of all these are collected in Comyn's Digest, tit. Market, pl. F.

The case of *Swindon Central Market Co.* v. *Panting* (4) shews that toll is payable by the buyer, and contains an

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) (1746) 2 Str. 1238; 1 Wils. 107.
(3) The quarto edition, 1576, reads not *et* but *s.* for *scilicet*: the proper English term "standing" being added for greater certainty after the vague word "lieu."—F. P.
(4) (1872) 27 L. T. 578.

explanation by Blackburn J. that "pur son lieu et son standing" means "a special place for his own standing." The passage referred to says that toll is by the law only payable on things sold, not on what is brought into the fair, but by custom a man may be liable to pay for goods brought into the fair, and he must pay for his place and his standing though he sells nothing. (1)

The case of *Yarmouth Corporation* v. *Groom* (2) shews that stallage is payable for baskets always brought to the same place. In this case the evidence is clear that places were allotted, and the people who attended regularly brought their baskets to the same place every week.

There is nothing in the argument that because the defendants charge more on fair days it must be a fair toll. The only increased tolls paid are clearly stallage, and for stallage the owner of the soil may charge what he likes so long as it is reasonable, and may differentiate between different persons: *Duke of Bedford* v. *Emmett.* (3) In *Northampton Corporation* v. *Ward* (4) the amount of stallage is treated as a matter of bargain. A person who has a right to a toll may charge different tolls to different persons so long as his highest toll is not unreasonable: *Hungerford Market Co.* v. *City Steamboat Co.* (5)

The case of *Norwich Corporation* v. *Swann* (6) shews that trespass lies for the unauthorized erection of stalls; tables, stools, and baskets are there treated as equivalent to stalls.

The owner is rateable in respect of stallage: *Duke of Bedford* v. *St. Paul's, Covent Garden.* (7)

Assumpsit is maintainable for stallage: *Newport Corporation* v. *Saunders* (8); *Baron de Rutzen* v. *Lloyd.* (9)

(1) *Nota conceditur arguendo* in the Prior of St. Bartholomew's case *anno* 9 H. 6 [45] that by law a man shall pay toll for nothing carried to a fair except what is sold, but by custom he may have to pay for everything brought to the fair, and he shall pay for his place, i.e. standing, though he sell nothing.—Brooke, Abr. *Tolle*, 2 [translated].

(2) (1862) 1 H. & C. 102.

(3) (1820) 3 B. & Al. 366.

(4) 2 Str. 1238; 1 Wils. 107.

(5) (1860) 3 E. & E. 365.

(6) (1777) 2 W. Bl. 1116.

(7) (1881) 51 L. J. (M.C.) 41.

(8) (1832) 3 B. & Ad. 411; 37 R. R. 456.

(9) (1836) 5 Ad. & E. 456; 44 R. R. 468.

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Reg. v. *Casswell* (1) only decided that the toll in that case was a franchise toll.

In *Rex* v. *Maidenhead Corporation* (2) a case is cited arguendo which shews that the right of toll may be forfeited but the fair remain.

The tolls received by the defendants are stallage, and properly payable to them as owners of the soil; but, even if this were not so, there is no possible ground for treating them as fair tolls collected on behalf of the plaintiff.

Butcher, K.C., in reply. Both on the facts and on the law the tolls taken by the defendants were fair tolls, not stallage. Stallage is only payable for exclusive occupation. Mere placing a basket on the ground does not create a liability to stallage: *Townend* v. *Woodruff* (3); *Rex* v. *Bell.* (4) In *Norwich Corporation* v. *Swann* (5) the basket was turned into a stall by making a table of the lid to sell from.

The cases of *Newport Corporation* v. *Saunders* (6) and *Yarmouth Corporation* v. *Groom* (7), where an action for stallage was held to be equivalent to an action for use and occupation, shew that there must be some definite and exclusive occupation. *Reg.* v. *Casswell* (1) and *London Corporation* v. *St. Sepulchre* (8) are to the same effect. *Duke of Bedford* v. *St. Paul's, Covent Garden* (9), is in my favour, for there was a specific appropriation of the soil.

As to the change of day, the Court will presume a licence. The only case quoted against me was *Benjamin* v. *Andrews* (10); but there the Court merely refused to presume a grant for an additional day's market from user, in the face of evidence which displaced any such presumption.

There is no presumption of the abandonment of a charter: *Niell* v. *Duke of Devonshire.* (11) The only presumption which would meet the case would be that the old fair granted by the charter had been abandoned, and a new one granted without toll.

(1) L. R. 7 Q. B. 328.
(2) (1619) Palm. 76, 82.
(3) (1850) 5 Ex. 506.
(4) (1816) 5 M. & S. 221; 17 R. R. 315.
(5) 2 W. Bl. 1116.
(6) 3 B. & Ad. 411; 37 R. R. 456.
(7) 1 H. & C. 102.
(8) (1871) L. R. 7 Q. B. 333, n.
(9) 51 L. J. (M.C.) 41.
(10) 5 C. B. (N.S.) 299.
(11) (1882) 8 App. Cas. 135.

An abuse of toll is a cause of forfeiture of the fair: Vin. Abr., tit. Market, F. 7, citing *Rex* v. *London Corporation*. (1) The case in Palmer (2) only decided that toll could be levied, though the charter was silent as to its amount. Neither the right to toll nor the franchise of the fair is forfeited by non-collection of toll: *Leicester Forest Case* (3); *Peter* v. *Kendal*. (4)

FARWELL J. The question in this case depends on the construction of a lease of certain tolls demised by the predecessor of the plaintiff to the predecessor of the defendants on November 11, 1851, and for its determination it is necessary to understand the subject-matter with which the parties were dealing, and to consider the conditions thereof at the date of the demise—a consideration which has entailed a prolonged examination out of all proportion to the value of the subject-matter of the action. [His Lordship read the charters and the proceedings in quo warranto, and proceeded:—]

Both sides relied upon these proceedings as evidence that tolls were properly payable in respect of the market and of the March fair; and for the reasons stated in *Attorney-General* v. *Simpson* (5) I think that they are admissible in evidence, and are sufficient to shew that Thomas de Furnivall took, and was entitled to take, tolls in respect of his market and fair. [His Lordship then stated the facts as above, and continued:—]

The plaintiff claims that all tolls taken on the fair days are fair tolls, and contends that the defendants must account for them accordingly. "A fair" (they say, quoting Gunning on Tolls, p. 44), "is a great sort of market, and a market is less than a fair," and they cite Coke's 2nd Inst., at p. 406: "Note there be words in the grant of a market, ita quod non sit ad nocumentum alterius mercati, and note that fairs are taken within this law, for every fair is a market, but every market is not a fair." If it were impossible for a market and a fair to coexist on the same day in the same manor for the benefit of the same lord, there might be some force in this contention;

(1) (1682) 2 Show. 263, 275.
(2) *Rex* v. *Maidenhead Corporation*, Palm. 76.
(3) (1603) Cro. Jac. 155.
(4) (1827) 6 B. & C. 703; 30 R. R. 504.
(5) [1901] 2 Ch. 671, 688.

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but it was not and could not be contended that there was anything like merger of the two: the two franchises are separate and distinct and of equal dignity; there is no question about a greater and a less estate such as is essential to merger, and the very charter of Edward I., under which the plaintiff claims, is inconsistent with any such contention, for the eight days' fair thereby granted on or around St. Cuthbert's day necessarily included a Wednesday, and yet the charter grants a market on every Wednesday. I cannot say that it is impossible for a fair to be held in one part of the manor of Worksop on the same day that a market is held in another part, and no authority has been cited shewing the impossibility of the coexistence of the two franchises on the same day. Then it is said that, even if this is so, a double set of tolls cannot be exacted, and that the tolls paid must be deemed to be fair tolls. It is not necessary for me to decide the first question, because the tolls taken by the defendants under their lease are, in my opinion, market tolls. The parties to that lease were contracting on the basis of the existing facts, namely, that no fair tolls had in fact been paid since the reign of Edward III., and that no fair tolls could be recovered in respect of the fairs on the two new fair days; and on the face of the deed itself it is apparent that the non-existence of fair tolls was in the contemplation of the parties. The first point is the result of the evidence in the case; it is really inconceivable that, where a franchise has been for at least three or four centuries enjoyed by two great families such as the Howards and Pelham Clintons, no record of any payment in respect thereof could be found if any such had really ever been made. It is urged that the franchise remains although the tolls have not been paid for centuries, and that there is nothing to prevent the plaintiff from now exacting them. I agree that the franchise of fairs is unaffected by the omission to collect the tolls. Tolls are not incident to a fair: *Heddy* v. *Wheelhouse* (1); but, as appears from the *Maidenhead Case* (2), "Icy per opinion del Court Toll n'est incident al market mes sont distinct choses." It owes its origin to a subordinate franchise appurtenant to the fair or market,

(1) (1597) Cro. Eliz. 591. (2) Palm. 76, 86.

differing in this respect from the court of pie powder, which is incident to a market: Coke's 2nd Inst., 220, 221; Com. Dig. Market, 1. The statement in Viner's Abridgement, tit. Market, F. 7 and 8, rests mainly on the statement of counsel in *Rex* v. *London Corporation* (1), but this statement, as pointed out by Messrs. Pease and Chitty in their excellent little treatise on markets and fairs, p. 60, n. (*c*), is founded on the false assumption that tolls are incident to fairs and markets.

There is great difficulty in presuming the extinction of the tolls, which formed this subordinate franchise. It has been urged that the effect of a surrender or forfeiture would not be to extinguish them, but to restore them to the Crown, and this appears to me to be correct. Thus in *Heddy* v. *Wheelhouse* (2) it was held by Popham, Gawdy, and Fenner that "such liberties which a common person hath by prescription or grant, and which, if the common person had not, the King himself should have throughout England, as Wayf, Estray, Wreck, &c., there, if the common person hath them by grant, or prescription, and they come to the King by forfeiture or otherwise they are extinguished in the Crown, and the Queen will have such liberties by her prerogative, and they cannot afterwards be granted, but by a new creation. But such liberties, which a common person hath by grant, or prescription, which the King (if such prescription had not been) could not have by his prerogative, as warren, park, fayr, market with toll, &c., if these come to the Crown, &c., they remain in esse, and are not extinct; for, if the King should not have them by this means, they would be lost." And to the same effect is the decision in the case of the *Abbot of Strata Mercella* (3): "When the King grants any privileges, liberties, franchises, &c. which were privileges, liberties, or franchises, in his own hands, as parcel of the flowers of his Crown . . . . there if they come again to the King they are merged in the Crown, and he has them again in jure coronæ. . . . But when a privilege, liberty, franchise, or jurisdiction was at the beginning erected and created by the King, and was not any such flower

(1) 2 Show. 263, 265, 276. (2) Cro. Eliz. 591.
(3) (1590) 9 Rep. 24 a, 25 b.

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before in the garland of the Crown, there, by the accession of them again to the Crown they are not extinct &c." It is not easy to see how the franchise of fair can be in the Lord, and the subordinate franchise of tolls, which exists only as appurtenant to the franchise, can be in the Crown. It is not, however, necessary for me to determine this point, for, whether the tolls are extinguished or not, I find as a fact that they had not been paid for many years before 1851, and that the parties to the lease of 1851 were contracting with that knowledge and on that footing.

I have been dealing so far with tolls payable under the charter in respect of fairs held on the days appointed by the charter. I have now to consider the effect of the change of days made in 1845. The Duke's predecessors altered these days mero motu; there is no evidence of any licence or authority from the Crown, or any assent of the inhabitants, even if the latter could have any legal effect.

At the date of the lease the alterations had been in force for five or six years only—a period far too short to give rise to any presumption of a lost grant or licence. Now an entire change of days, such as this, is doubtless a cause of forfeiture; but it has been held in *Lord Midleton* v. *Power* (1) that the Crown only can take advantage of such a forfeiture. I will assume that this is correct; but the charters that continued in existence in 1851 were the charters to hold fairs on the days therein specified, and could not support an action to recover tolls in respect of fairs held on other days.

It is said that the decision in *Lord Midleton* v. *Power* (1) is opposed to this; but I do not so read it. That case was for disturbance of fair: the Land League had, without any title, set up a rival fair, and the Vice-Chancellor held that the plaintiff, who had changed the day on which the fairs were held some twenty years or so before, was entitled to a declaration of his title, and an injunction restraining the defendants from disturbing his fair and damages. He put it on the ground that the defendants were obviously wrongdoers in setting up a new market without any grant from the Crown,

(1) 19 L. R. Ir. 1.

and that possession was a sufficient title in the plaintiff against wrongdoers. No question of tolls arose. The plaintiff had held a market on the days in question for several years, and was therefore primâ facie in possession. This, however, is no authority for the proposition that the owner of a fair on a given day with tolls, who changes the day without licence, can recover tolls.

The lord proclaims his fair, and thereupon every one has primâ facie the right to buy and sell at such fairs toll free: *Earl of Egremont* v. *Saul* (1); and if the lord sues for tolls he must prove his title thereto; the persons buying and selling are not wrongdoers; every person has of common right a liberty of coming into a public market for the purpose of buying or selling: per Cockburn C.J. in *Swindon Central Market Co.* v. *Panting* (2), citing *Northampton Corporation* v. *Ward* (3); and the lord has against them such rights only as he can prove.

The plaintiff's predecessor must, therefore, have put in evidence his charter, and on its production must have failed, for a market or fair cannot be a legal market or fair without a grant of the right to hold it on the day claimed: *Benjamin* v. *Andrews* (4); and if the fair was not legal, the tolls claimed in respect of it were not recoverable. I find, therefore, that in 1851 the plaintiff's predecessor had no right to demand any tolls in respect of the fairs held on the altered days, and that the contract between the parties in 1851 must be read on this basis.

I now turn to the lease itself. [His Lordship referred to the recitals and demise above set out, and continued:—] I do not of course say that, if there were in fact any tolls in respect of the fairs, they would not be duly excepted and reserved; but on the point of construction, the omission of all express reference to fair tolls is strongly corroborative of the view that the parties were contracting with the knowledge and on the basis that there were in fact no fair tolls.

But if this were not so, the plaintiff's contention is, in my

(1) (1837) 6 Ad. & E. 924; 45 R. R. 647.
(2) 27 L. T. 579.
(3) 2 Str. 1238; 1 Wils. 107.
(4) 5 C. B. (N.S.) 299.

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opinion, quite untenable. It must extend to this, either that such market tolls as are payable on fair days are not demised, or that the lessee has in some way or other a duty cast on him of not collecting his own market dues until fair dues are paid, or of collecting the fair dues in preference to the market dues, as and for the lessor. It is, in my opinion, impossible that a grantor can so derogate from his own grant, or that such a meaning can be given to this demise on any of the ordinary rules of construction. Further, during the six years prior to the writ, for which an account of tolls is claimed, it is true that the fair has been proclaimed; but the proclamation carries with it no right to hold the fair on the land of the defendants. No buying or selling has taken place during those six years except on the land of the defendants, and it is certainly difficult to see how the plaintiff can claim that the lessees are not only bound to collect his tolls for him, but also to provide the land on which the fair is held. Assuming that the plaintiff's fairs still exist, and can be held on the proper days, they cannot be held on the defendants' land without their consent.

Then it is said that the defendants have in fact received fair tolls as such; and some colour is lent to this contention by two items in the list of tolls to be taken in the provision market. [His Lordship stated the facts as to the tolls for stalls and eggs.]

I am of opinion that these tolls are not fair tolls, but stallage tolls. A fair toll is payable to the owner of the franchise in respect of goods sold in his fair, or brought into his fair for sale, whether he be the owner of the soil or not, and has nothing to do with the ownership of the soil. Stallage is paid in respect of some user of the soil, and can be exacted only by the owner of the soil. It is sufficient to refer to the case of *Northampton Corporation* v. *Ward* (1) and the *Duke of Bedford* v. *St. Paul's, Covent Garden.* (2) The land on which the stalls stand belongs to the defendants, and they make a charge for the exclusive occupation of the land and the convenience of stalls thereon. It is said that the fact that the toll is increased on fair days is fatal to this conclusion, because it is contended

(1) 2 Str. 1238; 1 Wils. 107, 114. (2) 51 L. J. (M.C.) 41.

that tolls must be the same for all persons, and that it follows, therefore, that the extra 1½*d.* must be fair tolls. In my opinion that is not the law. So long as the lord does not exceed the maximum toll that he is entitled to demand—(that is, a reasonable amount when the charter specifies no sum: *Stamford Corporation* v. *Pawlett* (1) and it is not suggested that 3*d.* is unreasonable)—he may remit all or a part of the toll to whomsoever he pleases. The reasoning in the case of *Hungerford Market Co.* v. *City Steamboat Co.* (2) applies, in my opinion, to the present case. In that case the company were authorized by statute to take tolls in return for service to the public, and Cockburn C.J., in delivering the judgment of the Court, consisting of himself, Hill, and Blackburn JJ., says (3): "We have therefore to consider whether a company entitled to take tolls in return for public service is bound, independently of express provision, to exact the same toll from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion. No authority has been adduced for the former of those propositions. In *Lees* v. *Manchester and Ashton Canal Co.* (4) the observations of Lord Ellenborough go no further than to shew that, on grounds of public policy, it may be desirable that such an obligation should attach to the power of a public company to take toll. Yet authority would certainly seem to be required to establish a proposition directly at variance with the well-known axiom that every one is at liberty to renounce a right established in his favour. The power to take the tolls is conferred on the company in consideration of service to be rendered, and accommodation to be afforded, to the public. If the service be rendered and the accommodation afforded, the obligation of the company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have a right to complain."

The justification for the grant of tolls in a market or fair

(1) (1830) 1 Cr. & J. 57; 35 R. R. 675.
(2) 3 E. & E. 365.
(3) 3 E. & E. 380.
(4) (1809) 11 East, 645; 11 R. R. 297.

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is the same as that in the *Hungerford Case* (1), namely, service to the public. The principle that every one may waive an advantage to himself applies as much to the owner of the market tolls as to the railway or steamboat company, and I see no ground on which the variation of tolls within the due limit can be said to be a wrong to any one.

This applies to all tolls, but with regard to stallage the case of the *Duke of Bedford* v. *Emmett* (2) is a direct authority for the variation where different prices are charged for different places in the market. It is said that these tolls cannot be stallage because the defendants are not rated in respect of them; and it is no doubt true that franchise tolls, as distinguished from tolls in respect of the occupation of the land, are not rateable: *Reg.* v. *Casswell* (3); but I am not satisfied on the evidence that the defendants are not rated in respect of these tolls. The only evidence is that the tolls are not separately rated. But even if the defendants are not properly rated, their default or mistake cannot alter the character of the use and occupation of the ground, which is the fact on which the question depends. There can, I think, be no doubt that the $1\frac{1}{2}d.$ and $3d.$ are stallage, and the question as to the payment for baskets which might give rise to some difficulty does not arise, because there is no variation of the tolls in respect thereof on market and fair days.

The action wholly fails and must be dismissed with costs, which, in accordance with the Public Authorities Protection Act, must be as between solicitor and client.

Solicitors: *Richard F. & C. L. Smith, for Marshalls & Bate, East Retford; Baker, Lees & Co.*

(1) 3 E. & E. 365. (2) 3 B. & Al. 366.
(3) L. R. 7 Q. B. 328.

J. R. B.

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April 15, 16, 24.

[1901 R. 546.]

Trustee and Cestui que Trust—Principal and Agent—Equitable Mortgagee—Conflicting Equities—Priority—Negligence—Enabling Third Person to commit Fraud—Estoppel—Receipt Clause—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 55.

R. delivered to a stockbroker a mortgage bond for 2000*l.* with instructions to sell it. The bond was one of a series issued by the Tyne Improvement Commissioners under a private Act which incorporated the Commissioners Clauses Act, 1847. That Act requires that all transfers of mortgages should be registered. Induced by the false representations of the broker, R. executed two deeds of transfer, by which the mortgage bond was transferred to the broker in two portions of 1500*l.* and 500*l.* respectively. These transfers were in a form prescribed by the schedule to the Commissioners Clauses Act, and were expressed to be made in consideration of 1500*l.* and 500*l.* respectively paid by the broker to R. They were duly registered. The broker borrowed 1000*l.* from the defendant W. and executed a formal sub-mortgage of the bond to him, producing the transfers as proof of title. This mortgage was not registered. The broker had applied the money to his own use and absconded. This action was brought by R. for retransfer of the bond free from the mortgage to W.:—

Held, that where an owner of property gives all the indicia of title to another person with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent, who has no notice of the limit.

If the owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property for value.

The statement, in a transfer of mortgage made in a form prescribed by statute, that the mortgage is transferred in consideration of *l.* paid by A. to B., without any express receipt clause, is sufficient to create this estoppel.

On both these grounds the equitable title of R. was postponed to W.'s charge.

Perry Herrick v. *Attwood*, (1857) 2 De G. & J. 21, explained and followed.

Carritt v. *Real and Personal Advance Co.*, (1889) 42 Ch. D. 263, explained and distinguished.

THE plaintiff in this action was the sole trustee of Charles Garroud, who died in 1893. Part of the trust estate consisted

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of a mortgage bond for 2000*l.*, issued by the Tyne Improvement Commissioners under statutory powers. The bond had been transferred into the plaintiff's name and the transfer duly registered.

In September, 1900, it was necessary to raise money for the purposes of the trust, and the plaintiff sent the bond to the defendant Hall, who was a stockbroker carrying on business at Darlington, with instructions to sell it. Hall knew that the plaintiff held the bond as trustee.

On December 13, 1900, Hall wrote to the plaintiff that he was arranging for the sale of the bond in two portions of 500*l.* and 1500*l.*, and inclosed two transfer deeds, by which two portions of the security were expressed to be transferred to Hall in consideration of 1500*l.* and 500*l.*, respectively, paid to the plaintiff by Hall. No money was in fact paid, but the plaintiff executed the transfers containing this statement and returned them to Hall on December 14. On January 4, 1901, the plaintiff received from the secretary to the Commissioners the usual notice that the transfers had been lodged for registration. The secretary afterwards pointed out that they were not in the proper form, and some alterations were made not affecting the statement of payment. The transfers as altered were sent by Hall to the plaintiff on January 28, 1901, were returned by the plaintiff to Hall re-executed with the alterations duly initialled, and on February 4, 1901, were duly registered by the Commissioners.

On December 17, 1900, Hall obtained from the defendant Webster, for his own use, a loan of 1000*l.* upon the security of the bond and the transfers, and executed a mortgage of the bond to Webster to secure that sum, representing himself to be the absolute owner. On December 28 Webster sent his mortgage deed to the secretary of the Commissioners for registration, and gave them notice of his mortgage. On June 18, 1901, the secretary wrote to Webster that the Commissioners could not take cognizance of his notice, but that he could have the mortgage registered as an absolute assignment if he desired. On January 28 Webster wrote that he did not propose to have his mortgage registered at present. Meanwhile

the plaintiff had been pressing Hall to complete the sale of the securities. Hall absconded on March 11. On March 14 the plaintiff gave Webster notice of his title, and on the 18th Webster sent in his mortgage to the Commissioners with a request to register it. Before this was done the plaintiff issued his writ in this action, making Hall, Webster, and the Commissioners defendants, and asking for retransfer of the bond to him.

Hall was made bankrupt after the action was brought, and his trustee did not appear. Webster died before the hearing, but his evidence had been taken on commission.

It was contended that Webster, who was a friend of Hall's, knew of Hall's insolvency at the time he took his mortgage, and must have known that he could not have paid 2000*l.* for the bond; but the judge held that there was nothing to suggest that his conduct was in any way open to suspicion.

The issue and transfer of the mortgage bonds of the Tyne Improvement Commissioners were regulated by a series of private Acts of Parliament, one of which, the Tyne Improvement Act, 1850, incorporated the Commissioners Clauses Consolidation Act, 1847 (10 & 11 Vict. c. 16). Sect. 78 of the last-mentioned Act contained provisions as to the registration of transfers of mortgages practically identical with those of s. 15 of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) as to registration of transfers of shares. The transfers were in a statutory form contained in a schedule to the Commissioners Clauses Consolidation Act and in a schedule to the private Act of 1850.

Upjohn, K.C., and *Hart*, for the plaintiff. This case is a mere contest of equities. The legal right to the bond could not pass to Webster until registration was complete: *Nanney* v. *Morgan* (1); and the plaintiff has only an equitable interest, for the legal right is in Hall. The plaintiff's equity is prior to the defendant's in date, and must prevail. In the first place, Hall was a trustee for him; and if the defendant Webster contends that he had no notice of the trust, and the plaintiff

(1) (1887) 35 Ch. D. 598; 37 Ch. D. 346.

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had enabled Hall to deceive him, so that he was entitled to treat Hall as a purchaser from the plaintiff, still the plaintiff has a lien for unpaid purchase-money, which gives him the prior equity. That lien applies to chattels as well as land: *Davies* v. *Thomas* (1); *Collins* v. *Collins* (2), where the purchase was that of a mere debt.

In *White* v. *Wakefield* (3) the lien was held to be lost because the purchaser, knowing that the vendor was a trustee, had given a receipt indorsed on the deed for the whole purchase-money. Here there is no indorsed receipt; and no express receipt in the body of the transfer deeds. Sect. 55 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), does not apply: *Renner* v. *Tolley*. (4) The words are: "a receipt for consideration money." That means a proper receipt clause. The section was intended to get rid of the necessity for an indorsed receipt, not to make the expression of the consideration into a receipt. There was an express receipt in *Lloyd's Bank* v. *Bullock* (5), and all the other cases reported on the section.

No doubt, though a purchaser of a chose in action takes subject to all equities, the owner of the equity may put himself into such a position that he cannot equitably enforce it. In *Bickerton* v. *Walker* (6) it was held that a mortgagor who had given an indorsed receipt for the whole mortgage money could not, as against an innocent transferee, redeem for the less amount he had actually received. But in *In re Natal Investment Co.* (7) it was held that a company who had given debentures reciting that 500*l.* was owing by the company and agreeing to pay it were not prevented from setting up the equitable defence that nothing was due. The plaintiff was entitled to make Hall his trustee, and put all the evidence of title into his hands: *Carritt* v. *Real and Personal Advance Co.* (8) That case also strongly supports the *Natal Case* (7) by shewing that the contents of a deed do not prevent an assignee

(1) [1900] 2 Ch. 462.
(2) (1862) 31 Beav. 346.
(3) (1835) 7 Sim. 401; 40 R. R. 163.
(4) (1893) 68 L. T. 815.
(5) [1896] 2 Ch. 192.
(6) (1885) 31 Ch. D. 151.
(7) (1868) L. R. 3 Ch. 355.
(8) 42 Ch. D. 263.

of a chose in action taking subject to the equities. If an owner gives authority to another person to mortgage property up to a certain limit, and he mortgages for a sum beyond the limit to a person who has no notice, the owner will be bound: *Perry Herrick* v. *Attwood* (1); *Brocklesby* v. *Temperance Permanent Building Society* (2); but it has never been held that an authority to mortgage will support a sale, or that an authority to sell will support a mortgage.

Jenkins, K.C., and *W. Baker*, for the defendant Webster. The case comes within the general rule that where one of two innocent persons must suffer loss through the fraud of a third, he who has enabled the third person to commit the fraud must sustain the loss: *Farquharson Brothers & Co.* v. *King & Co.* (3)

The cases as to trustees do not apply. It was not the object of the plaintiff to make Hall a trustee to hold the property for him. The transaction was either a sale to Hall leaving him trustee of the purchase-money, or, more probably, an appointment of Hall as agent to sell. It has been established that if a man makes another his agent to borrow, and gives him the indicia of title, a borrower from him is not bound by any secret limit placed on his authority by the principal. This is an a fortiori case, for by giving Hall the legal estate the plaintiff put him in a position to deal with the property as absolute owner. There may be no precise decision that an authority to sell authorizes a mortgage; but the case is within the principle that no secret limit can be put on a general authority to an agent: *Henderson & Co.* v. *Williams*. (4) The case of a trustee is an exception. But it must be a trustee legally constituted. Every agent is in a fiduciary position, and so in a sense a trustee. In that sense, both in *Brocklesby* v. *Temperance Permanent Building Society* (2) and *Perry Herrick* v. *Attwood* (1) the person who committed the fraud was a trustee; but that contention was not allowed to prevail. The principal cannot be better off because he has given his agent the legal estate. He cannot say that he meant to appoint an agent, but his own negligence has made him at law a trustee.

(1) 2 De G. & J. 21.
(2) [1895] A. C. 173.
(3) [1901] 2 K. B. 697 [reversed in H. L. June 17, W. N. 1902, p. 122].
(4) [1895] 1 Q. B. 521.

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National Provincial Bank of England v. *Jackson* (1) shews that a person who conveys the legal estate to another cannot, until the deed is set aside, be heard to say it was only for a limited purpose.

The deeds of transfer contained a receipt within the meaning of s. 55 of the Conveyancing Act, 1881; the words "thereby acknowledged to be received" must include cases where the word receipt is not used. If that is so, *Lloyd's Bank* v. *Bullock* (2) puts the plaintiff out of Court.

Renner v. *Tolley* (3) depended on the special circumstances of the case.

The defendant Webster was at the date of the commencement of the action in the same position as if he had had the legal estate; he was absolutely entitled to registration, and nothing but mere formalities were wanting: *Moore* v. *North Western Bank*. (4)

Upjohn, K.C., in reply. On the last point, as to registration, *Ireland* v. *Hart* (5) is conclusive against the defendant.

Upon the general case, *Shropshire Union Railways and Canal Co.* v. *Reg.* (6), and the general statement of the law in the judgment of the Court of Appeal delivered by Fry L.J. in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (7), are strong authorities in the plaintiff's favour.

Cur. adv. vult.

April 24. FARWELL J. The question in this case is one of conflicting equities. The legal title is in Hall. Webster never obtained the registration which was essential, under the Commissioners Clauses Consolidation Act, to obtaining a legal title; nor had he, when he requested the Commissioners to register his mortgage on March 18, "a present absolute unconditional right to registration": see *Nanney* v. *Morgan* (8); *Ireland* v. *Hart*. (5)

The question for my determination, therefore, is whether the

(1) (1886) 33 Ch. D. 1.
(2) [1896] 2 Ch. 192.
(3) 68 L. T. 815.
(4) [1891] 2 Ch. 599.
(5) [1902] 1 Ch. 522.
(6) (1875) L. R. 7 H. L. 496.
(7) (1884) 26 Ch. D. 482, 492.
(8) 37 Ch. D. 346.

plaintiff has, by any act or default of his own, displaced the higher equitable right that is given him by the priority of his title in point of date.

It is contended that there is a broad general principle, perhaps most succinctly stated by Ashhurst J. in *Lickbarrow* v. *Mason* (1), that "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." But, to adopt Lord Selborne's words in *Sewell* v. *Burdick* (2): "It is often dangerous to infer, even from very strong words, when used diverso intuitu, conclusions on other subjects which if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified." It would serve no useful purpose if I were to attempt to go through and discuss the various common law cases that have been cited to me, especially as in the last, *Farquharson Brothers & Co.* v. *King & Co.* (3), there is a remarkable conflict of judicial opinion; but I desire to express my respectful concurrence with the observations of Vaughan Williams L.J. in that case, "that it is impossible, in the face of various authorities on the subject, to say that, in every case in which the act of one of two innocent persons has enabled a third person to occasion loss, the first-mentioned person must sustain the loss." It is, indeed, plain that a man may in many cases intrust another with all the indicia of ownership, including the legal title, and yet not deprive himself of his equitable rights. I am not concerned to consider the cases at common law, as the case before me is one of equities only. It is sufficient to refer to two authorities to illustrate my meaning. A man may transfer his shares in a company to a single trustee, and intrust him with the certificate, and yet enforce his equitable title against a purchaser or mortgagee of the trustee who has not obtained the legal title: *Shropshire Union Railways and Canal Co.* v. *Reg.* (4) Again, he may cause land purchased by him to be conveyed to a trustee by a deed containing a statement that the trustee has

(1) (1787) 2 T. R. 63, 70; 1 R. R. 425.

(2) (1884) 10 App. Cas. 74, 81.

(3) [1901] 2 K. B. 697, 712 [see note p. 167 above].

(4) L. R. 7 H. L. 496.

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paid the purchase-money and may hand over the deed to him and yet enforce his equitable title in a similar way: *Carritt* v. *Real and Personal Advance Co.* (1) The principle upon which those cases are founded is stated by Lord Cairns, so far as relevant to the present case, in *Shropshire Union Railways and Canal Co.* v. *Reg.* (2): "My Lords, in the first place, the arguments at your Lordships' bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the indicia of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognised, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law."

Then a little further on he says: "In the fourth place, this circumstance was relied upon, that the cestuis que trust had allowed the trustee to have possession of the certificates of the

(1) 42 Ch. D. 263. (2) L. R. 7 H. L. 507, 509.

shares. Now a certificate of the shares or stock of a railway company is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate. Undoubtedly the stock did stand in the name of Mr. Holyoake. If I am right, the directors were justified in having it in his name, and they were also justified in giving him the certificates, which did no more than tell that which any person would have found out by looking at their books, namely, that the stock stood in his name."

On the other hand, it is equally well settled that if a man hands over the indicia of title to a third person, for the purpose of enabling that person to raise money, either for his own benefit—*Perry Herrick* v. *Attwood* (1)—or for the benefit of the owner—*Brocklesby* v. *Temperance Permanent Building Society* (2)—but with a limit on the amount, the lender, being ignorant of the limit, is entitled to a charge for the whole amount advanced although it exceed the limit.

It is sufficient to read one passage from Lord Macnaghten's judgment: "A person places his title-deeds under the control of an agent and instructs the agent verbally to procure for him a certain sum by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter intrusted to his agency? It would seem to be in accordance with common sense that the loss should fall upon the principal. No authority has been produced to the contrary; and the judgment under appeal is in accordance with the principle of the decision in *Perry Herrick* v. *Attwood* (1), though the facts of the two cases are different. The principle laid down in *Perry Herrick* v. *Attwood* (1) seems to be this: if a person permits title-deeds, which belong to his security, to be dealt with for the purpose of creating a preferential charge of a

(1) 2 De G. & J. 21. (2) [1895] A. C. 173, 184.

FARWELL J. 1902 RIMMER v. WEBSTER.

definite amount and the limit is exceeded, he cannot, as against innocent third parties who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded in that respect. *Perry Herrick* v. *Attwood* (1) was not a case of agency, but it seems to me that the principle is equally applicable in a case of that sort."

The principle underlying those cases is that the man possessed of the prior equity cannot be deprived of his title unless he has been guilty of some negligence. But the word "negligence" imports the neglect of some duty towards the person injured: *Swan* v. *North British Australasian Co.* (2) A man is entitled to deposit his deeds with his solicitor or his banker, or to send his certificates to his broker, or to vest his property in the name of another person and hand him the title-deeds, without thereby giving rise to any implication inconsistent with his own beneficial title, because his acts are in accordance with the common usage of mankind; and no other member of the community, therefore, is entitled to allege that such a course of action contains any invitation to him to act, from which a duty to him can be inferred. But the course of action above mentioned is also consistent with an intention that the person to whom the indicia of title are intrusted should deal with them; and if it is once proved, or admitted, that such was the intention, the case then falls to be decided in accordance with the principles governing the cases of authority given by a principal to an agent; and the owner comes under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority, which he has by his own act made apparently co-extensive with absolute ownership. This disposes of Mr. Upjohn's contention that the cases of *Perry Herrick* v. *Attwood* (1) and *Brocklesby* v. *Temperance Permanent Building Society* (3) are confined to an excess of the limit of borrowing, and do not extend to a mortgage when the authority is only to sell. The authority which the owner has given can only be limited by the indicia of property which he has given; the particular authority proved

(1) 2 De G. & J. 21. (2) (1863) 2 H. & C. 175.
(3) [1895] A. C. 173.

or admitted is necessary in order to make the case one to which the principles of agency apply at all; but when that is once proved, and the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee. It is argued that Hall became a trustee for sale when the bond was transferred to him, and that a trust for sale does not authorize a mortgage. But it was the unnecessary transfer of the legal title to Hall that enabled him to deal with the bond as owner, and the principles which I have stated are equally applicable whether the dishonest vendor or mortgagor has the legal title as a trustee or not. The gist of the case is that the real owner has invested the dishonest vendor or mortgagor with all the indicia of title as absolute owner for the purpose of enabling him to deal with the property, although in a limited way only; whether the trust was to sell only, or to mortgage only, is immaterial, if the mortgagee or purchaser had no notice of the existence of any trust at all.

Further, there is another class of cases distinct from the cases of authority or agency which do fall under the general principle which I have cited from *Lickbarrow* v. *Mason* (1), and these are cases of pure estoppel. If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value. *Rice* v. *Rice* (2) is a good illustration. If a man acknowledges that he has received the whole of the purchase-money from the person to whom he transfers property, "he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of

(1) 2 T. R. 63, 70; 1 R. R. 425. (2) (1853) 2 Drew. 73, 83.

FARWELL J. 1902 RIMMER v. WEBSTER.

incumbrance or adverse equity," and he cannot be heard to say that he has not in fact received such purchase-money. It makes no difference, in my opinion, whether that acknowledgment is made before the Conveyancing Act, on a conveyance of land by the receipt clause in the body of the deed and the indorsed memorandum, or since the Act by the former only; or in a statutory transfer by the statement in the statutory form that the money has been paid. The statutory form is given in the schedule to the Commissioners Clauses Consolidation Act as the effectual mode of transfer, and the Act requires the true consideration to be stated; it would be disastrous now to hold that these forms, which have been used for years, are not fully effectual, but require to be supplemented by a conveyancer's receipt clause.

There is nothing adverse to this in *Carritt* v. *Real and Personal Advance Co.* (1) In that case the purchaser on completion took the conveyance of land to a trustee for himself; the purchaser's name did not appear on the conveyance, but the purchase-money was stated to have been paid by the trustee. Chitty J. held that this statement did not involve any representation that the trustee had paid for the property out of his own money. But his decision does not extend to a case where the owner himself conveys, in consideration of the payment of the purchase-money to himself, by the transferee. The distinction is obvious: the mere statement that the purchase-money has been paid by the transferee is consistent with such payment having been made out of trust money in his hands belonging to other persons; but it is not consistent with absolute non-payment. There is no contradiction of the deed in saying, "True, the purchase-money was paid by him, but out of some third person's money"; there is a direct contradiction in saying that it was never paid at all.

In this case the plaintiff transferred the whole legal title to Hall for the purpose of enabling him to sell; and he executed a transfer which stated that Hall had paid him the consideration, and he was fully aware of this.

Whether the case be regarded as one of general authority

(1) 42 Ch. D. 263.

with no limit brought to the mortgagee's notice, or as one of estoppel, the plaintiff, in my opinion, fails to establish the priority that he claims; and his claim to a vendor's lien is also defeated on similar principles: see *Rice* v. *Rice* (1) and *White* v. *Wakefield*. (2) There will be the usual decree for redemption.

FARWELL J. 1902 RIMMER v. WEBSTER.

Solicitor for plaintiff: *H. W. Henniker Rance.*
Solicitors for defendant: *Williamson, Hill & Co.*

J. R. B.

In re CARROLL. BRICE *v.* CARROLL.

FARWELL J. 1902 *May* 9.

[1902 C. 165.]

Trust—Breach of Trust—Money lent to Solicitor without Security with Notice —Summary Order on Solicitor—Practice.

In an administration action it appeared that the trustee had lent moneys of the trust estate without security to his solicitor, who had accepted the loan with notice that it was trust money. The solicitor was not a party to the action:—

Held, that the Court, in the exercise of its summary jurisdiction over its officers, had power, on motion in the action, to order the solicitor to bring the money into court.

In such a case the notice of motion should be entitled in the action and in the matter of the particular solicitor.

THIS was an originating summons taken out in January, 1902, by two of the legatees under the will of Elizabeth Carroll, who died in 1894, against P. Carroll, the sole executor of the will. The plaintiffs claimed payment of the legacies given to each of them by the will; administration of the estate; and that the defendant should bring into court all moneys in his hands belonging to the estate. By the terms of the will the plaintiffs were to be paid their legacies on attaining twenty-five. The plaintiff Emma Brice had recently attained that age, but her co-plaintiff E. Vale would not attain that age until 1904.

(1) 2 Drew. 73. (2) 7 Sim. 401; 40 R. R. 163.

FARWELL J. 1902 CARROLL, *In re.* BRICE *v.* CARROLL.

On February 25 the usual order for a common account was made against the defendant, who was a clerk in the employment of a Mr. McIntosh, a solicitor, who was acting as his solicitor in the action, and who had acted as his solicitor in proving the will.

On April 7 the defendant filed his accounts, verified by affidavit, from which it appeared that the net residuary estate of the testatrix available for payment of the legacies given by her will amounted to 902*l.* 9*s.* 9*d.*; and that 450*l.* 4*s.* 10*d.* of this sum (which represented the legacies of the plaintiffs) had been lent by the defendant in 1896 to Mr. McIntosh at 4 per cent. interest without any security subject to six months' notice; and that notice calling in the money had been given to Mr. McIntosh last August, but it had not been paid.

On April 28 the Court, on motion by the plaintiffs for an order on the defendant to pay the 450*l.* 4*s.* 10*d.* into court, declined to make any order on the ground that the money was not in the hands of the defendant. Thereupon the plaintiffs served Mr. McIntosh with notice of motion for an order on him to bring the money into court. This notice of motion was headed in the action, and also "In the matter of Francis Hugh de Mortimer McIntosh, one of the solicitors of the Supreme Court." Mr. McIntosh filed an affidavit in opposition to the motion, in which he admitted that he had accepted the loan of the 450*l.* 4*s.* 10*d.* from the defendant with notice that it was trust money, and stated his intention to repay it "in due course," but objected that the Court had no jurisdiction in an action, to which he was not a party, to make an order upon him.

Sheldon, for the plaintiffs. The Court in the exercise of its jurisdiction over its own officers will give summary relief in a case like this, and not compel the trustee to sue the solicitor: *In re Clerihew's Estate* (1); *Staniar* v. *Evans*. (2) A solicitor who takes trust money in this way from his clerk holds it practically as a trustee, and the Court will not allow him to retain it.

(1) (1871) 24 L. T. 860. (2) (1886) 34 Ch. D. 470.

Muir Mackenzie, for McIntosh. The jurisdiction of the Court over its officers is admitted, but it is a power that will be exercised carefully. The cases cited are distinguishable from the present. In *In re Clerihew's Estate* (1) the solicitor was a trustee of the will; and in *Staniar* v. *Evans* (2) the solicitors had received the money as solicitors to the estate under a representation that was not correct, and, moreover, no objection to the jurisdiction was raised. (3) Here McIntosh is not the solicitor of the plaintiffs, and the money is not in his hands as solicitor to the estate. He received it under a distinct contract of loan with the trustee, which may have been an improper investment on the part of the trustee, but which did not make him a trustee of it. He is liable to the trustee for it, but not to the estate. It will be extending the principles and practice of the Court to make a summary order here. It can only be done where the money is received by the solicitor as the hand of the trustee.

Sheldon, in reply.

FARWELL J. In my opinion this is a very bad case. The defendant Carroll being a clerk in the employment of this solicitor in 1895, received as executor of the will of the testatrix in this action a small sum of money to which the plaintiffs are now entitled. This money he handed over to his master, who had acted as his solicitor in proving the will of the testatrix, and who took it knowing it to be trust money and retained it without giving any security. As long ago as August last the money was called in. It is not forthcoming, and now this solicitor makes an affidavit in which he states that he will pay the money "in due course," whatever that may mean. The only defence to the present application is that this Court has no jurisdiction to make the order. In my opinion, the two cases that have been cited sufficiently support this application, and are authorities to shew that the Court has jurisdiction to make a summary order on its officer in a case like this. I adopt the language of James L.J. in *In re Clerihew's Estate* (4),

(1) 24 L. T. 860.
(2) 34 Ch. D. 470.
(3) 34 Ch. D. 478.
(4) 24 L. T. 861.

FARWELL J. 1902 CARROLL, *In re.* BRICE *v.* CARROLL.

where he says, "it would be a shocking thing if this order could not be made." The order I make is that Mr. McIntosh do bring the money into court within fourteen days, and I also order him to pay the costs of this motion.

Solicitors: *W. R. Millar & Sons; de Mortimer-McIntosh & Shaw.*

H. L. F.

FARWELL J. 1902 *May* 14.

In re CREDIT ASSURANCE AND GUARANTEE CORPORATION, LIMITED.

Company—Reduction of Capital—Articles of Association—Losses to be borne in Proportion to Capital paid up on Shares—Shares of the same Class with Different Amounts paid—Deferred Shares.

Where the articles of association of a company provide that in the case of a winding-up losses are to be borne by the members in proportion to the capital paid up on their shares, the same rule must be applied in the case of any reduction of capital as well between shares in the same class with different amounts paid as between different classes of shares. The Court has a discretion, and is not bound to insist on the application of this rule to different classes of shares where no injustice will be done by throwing the whole reduction on one class of shares.

THE Credit Assurance and Guarantee Corporation, Limited, was incorporated in 1897 with a capital of 1,000,000*l.*, divided into 2000 deferred shares of 1*l.* each and 99,800 ordinary shares of 10*l.* each.

The memorandum of association of the company provided that the profits should be applied, after carrying to reserve such sums as might be thought expedient by the directors . . . . in paying a dividend upon the ordinary shares, at the rate of 10 per cent. per annum on the amount paid up for the time being; and that one-half the surplus should be paid to the holders of deferred shares, and the other half, subject to payment thereout of such extra remuneration to the directors as the company in general meeting should direct, should belong to the ordinary shareholders.

The articles of association gave the company power to reduce capital, and contained the following article:—

"152. If the corporation shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

The 2000 deferred 1*l.* shares had been issued, as fully paid, to the subscribers of the memorandum of association in consideration of their underwriting a part of the capital.

Of the ordinary 10*l.* shares 1123 had been issued to the vendors as paid up to the extent of 5*l.* On the other 2621 ordinary shares issued, 2*l.* only had been called up and paid.

The company had had losses, and on December 12, 1901, passed a special resolution, which was afterwards duly confirmed: "That the capital of the company be reduced to 850,300*l.*, divided into 99,800 ordinary shares of 10*l.* each and 2000 deferred shares of 1*l.* each, and that such reduction be effected by cancelling capital to the extent of 1*l.* 10*s.* in respect of each of the ordinary shares in the company's capital . . . . which have been issued and are now outstanding, and by reducing the nominal amount of all the ordinary shares in the company's capital from 10*l.* to 8*l.* 10*s.*"

The minute proposed to be registered stated: "The capital of the company is 850,300*l.*, divided into 99,800 ordinary shares of 8*l.* 10*s.* each and 2000 deferred shares of 1*l.* each, reduced from 1,000,000*l.*, divided into 2000 deferred shares of 1*l.* each and 99,800 ordinary shares of 10*l.* each. At the time of registration of this minute 1123 of the said ordinary shares have been issued, and are paid up or considered as paid up to the extent of 3*l.* 10*s.* per share, and 2621 of the said ordinary shares have been forfeited for non-payment of calls, and the remaining 33,968 have been issued and were paid up to the extent of 10*s.* per share."

This was a petition by the company for confirmation of the proposed reduction.

FARWELL J.

1902

CREDIT ASSURANCE AND GUARANTEE CORPORATION, LIMITED, *In re.*

Upjohn, K.C., and *W. A. G. Woods*, for the petition.

Jenkins, K.C., and *Martelli*, for shareholders opposing, took a preliminary objection. It is proposed to throw the reduction wholly on the ordinary shares. The rule is that all classes should be reduced equally, and the deferred shares ought to be reduced too.

The ordinary shares are not all paid up to the same amount, and as by art. 152 losses are in a winding-up to be borne in proportion to the amount paid up, the reduction ought to follow the same rule.

Upjohn, K.C., and *W. A. G. Woods*. As to the founders' shares. The general rule is that the reduction should be equally distributed among all classes of shares; but the shareholders have power to vary this: *British and American Trustee and Finance Corporation* v. *Couper*. (1) In this case a reduction in the deferred shares would not affect the dividend; and the reduction, which would not be more than 1*s*. a share, is too trivial to affect any question of return of capital.

As to the difference in the amounts paid up on the ordinary shares, art. 152 is a mere bargain between the shareholders, to take effect only in case of a winding-up. The shareholders can alter the bargain: *Bannatyne* v. *Direct Spanish Telegraph Co*. (2) This is not a case in which, by the constitution of the company, loss, whenever it happens, must fall on a particular class of shares, as in *In re Floating Dock Company of St. Thomas*. (3) Here there is a mere casual difference in the amount paid up on shares of the same class, which might vary from day to day, for the company have power to accept payment in advance of calls.

FARWELL J. As regards inequality between the ordinary and the deferred shares, inasmuch as the moiety of profits after 10 per cent. has been paid on the ordinary shares is to go to them, it does not much matter, so far as dividend is concerned, how much is deemed to be paid up. Whatever the amount may be, the ordinary shares get a moiety. And with

(1) [1894] A. C. 399. (2) (1886) 34 Ch. D. 287.
(3) [1895] 1 Ch. 691.

regard to the return of capital on a winding-up, the sum concerned is so very small that I do not think I ought to regard the inequality as being a reason for not approving the reduction in a case where the Court has a discretion, and can consider whether it is fair or not.

But as regards the inequality in the amounts paid up on the ordinary shares, I feel obliged to allow the objection. I confess I do it with some reluctance, but I do not see how to avoid it. Some of the company's shares were issued under a registered contract, with 5*l.* paid up on the 10*l.* shares. On other shares 2*l.* have been paid up. The ordinary rule, in the absence of special provision, would be that the assets available for distribution in the winding-up would be distributed amongst the members in proportion to the nominal amount of capital held by them. But, in order to avoid that, this company has a special provision in their articles which I need not read again: it is to be found in Mr. Palmer's book (Company Precedents, 8th ed. Pt. I. p. 659). Now, as I understand it, in these cases of reduction of capital, the Court acts upon the principle that the reduction is a sort of anticipation, to a limited extent, of what would take place if there was a winding-up. I think that appears reasonably plain from Cotton L.J.'s judgment in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1) He says: "If there was a winding-up, the capital being partly lost, the preference shareholders and the ordinary shareholders must bear the loss rateably between them, because these shares were constituted without any preference as regards capital, though they had a preference as regards dividend. Then, if that is so, and there is a loss of capital, in consequence of which there is a reduction made in the capital of the company by reducing the nominal amount of the shares, that must be borne not only by the ordinary shareholders but also by the preference shareholders." As I understand, that means this. When you come to consider the reduction of capital under the Act of 1877, you have to consider what would take place supposing there was a present liquidation; and, looking at the articles to see what the bargain is in that case, you apply it as far as you

(1) 34 Ch. D. 299.

FARWELL J. 1902 CREDIT ASSURANCE AND GUARANTEE CORPORATION, LIMITED, *In re.*

can to the limited liquidation which you are making, by way of anticipation, by sanctioning the reduction. There is the bargain in the article. I do not see how I can avoid giving effect to it. I quite agree that it leads to great inconvenience; but it is the bargain, and I do not feel at liberty to disregard it. The petition is based on a wrong footing, and I must dismiss it with costs.

Solicitors: *Greenwood & Greenwood; R. Chapman.*

J. R. B.

JOYCE J. 1902 *Feb.* 14, 15, 24, 25; *March* 26.

MAYOR OF DEVONPORT *v.* TOZER.

[1901 D. 298.]

Local Government—Urban Authority—By-laws—Infringement—Erection of Houses abutting on Public Highway—Laying out New Street—Injunction—Special Remedy—Proceedings before Justices—Jurisdiction.

The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough by-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the by-laws:—

Held, (1.) that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the by-laws; (2.) that the by-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; and (3.) that no such declaration as asked for ought to be made.

TRIAL OF ACTION.

This was an action by the corporation of Devonport, as the urban authority for the district of the borough, for an injunction to restrain the defendants from laying out certain existing

highways within the borough as new streets, in contravention of the plaintiffs' by-laws. The defendants were the owners of a piece of land described in the statement of claim as a building estate, and known as "Great Three Corners." This piece of land contained a little more than three acres, and was in the shape of a triangle, one side abutting upon a public highway for all kinds of traffic, known as Ham Lane, and another side upon a similar public highway known as Tavistock Road. Tavistock Road was, prior and down to November, 1900, a main road leading from Devonport to Tavistock, and as such, by the Local Government Act, 1888, s. 11, sub-s. 6, vested in the county council. The roadway of Ham Lane was within the borough of Devonport, the fence of the defendants' land being, down to November, 1900, the boundary of the borough there. But the defendants' land, together with the portion of Tavistock Road upon which the defendants' land abutted, was within the rural district of Plympton St. Mary, the land on the opposite side up to the fence of the road being in the borough of Plymouth.

Within the rural district of Plympton St. Mary there were certain by-laws, with respect to new streets, framed under s. 157 of the Public Health Act, 1875. These by-laws provided (inter alia): (1.) "Width, applied to a new street, means the whole extent of space intended to be used, or laid out so as to admit of being used as a public way." "With respect to the level of new streets: 3. Every person who shall lay out a new street shall lay out such street at such level as will afford the easiest practicable gradients throughout the entire length of such street for the purpose of securing easy and convenient means of communication with any other street or intended street with which such new street may be connected or may be intended to be connected, and as will allow of compliance with the provisions of any statute or by-law in force within the district for the regulation of new streets and buildings." "With respect to the width and construction of new streets: 4. Every person who shall lay out a new street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be 36 feet at the least."

JOYCE J. 1902 DEVONPORT CORPORATION v. TOZER.

"5. Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every by-law relating to a new street intended for use as a carriage-road." "7. Every person who shall construct a new street for use as a carriage-road shall comply with the following requirements." Then followed specifications as to the mode of construction, levels, and other matters. By-law 90 provided that every person who should intend to lay out a street should give to the sanitary authority certain notices and deliver plans and sections of such intended street; and by-law 97 provided that "Every person who shall offend against any of the foregoing by-laws shall be liable for every such offence to a penalty of 5*l.*, and in the case of a continuing offence to a further penalty of 40*s.* for each day after written notice of the offence from the sanitary authority. Provided nevertheless that the justices or Court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this by-law." By-law 98 was as follows: "If any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk of the sanitary authority, and shall be duly served upon or delivered to such person, shall be required on or before such day as shall be specified in such notice by a statement in writing under his hand or under the hand of an agent duly authorized in that behalf and addressed to and duly served upon the sanitary authority to shew sufficient cause why such work shall not be removed, altered, or pulled down; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorized in that behalf before the sanitary authority and shew sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause why such work shall not be removed, altered,

or pulled down, the sanitary authority shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work"; the statutory provision there referred to being s. 158 of the Public Health Act, 1875.

By Part V. of the Devonport Corporation Act, 1900, it was in effect enacted that as from November 9, 1900—the date of the commencement of that part of the Act—the boundaries of the borough and parish of Devonport should be extended so as to comprise the piece of land in question—that was to say, "Great Three Corners," belonging to the defendants, and the portion of Tavistock Road adjoining thereto, the land on the opposite side of that road remaining, as it previously was, in the borough of Plymouth. Sect. 43 of the Act incorporated (inter alia) Art. XII. of the Devonport Extension Order, 1898, which order was confirmed by the Local Government Board's Provisional Order Confirmation (No. 10) Act, 1898. The combined effect of the said s. 43 and of the said Art. XII. was to provide that all by-laws and regulations and any list of tolls and table of fees made by the corporation which at the commencement of the Devonport Corporation Act, 1900, should be in force in the existing borough should thenceforth apply to the borough as extended by the said last-mentioned Act until or except in so far as any such by-laws or regulations or list of tolls or table of fees might be altered or repealed, and all by-laws and regulations made by the council of the said rural district should on that date cease to be in force or have any effect in any part of the added area, but without prejudice to anything duly done thereunder, provided that any proceedings which might have been taken by the council of the said rural district against any person for any offence against such last-mentioned by-laws and regulations committed before the commencement of Part V. of the Devonport Corporation Act, 1900, might be taken by the plaintiffs as if those by-laws and regulations had remained in force and the plaintiffs had been substituted therein for the local authority of the added area.

The defendants' land, though now within the borough of Devonport, was at a considerable distance from any town. The by-laws of the borough of Devonport, though differently

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numbered, were, so far as material to this case, to the same effect as the by-laws of Plympton. The defendants, prior to the commencement of the Devonport Corporation Act, 1900, began to erect houses upon their land, in reference to which houses proper plans were deposited with and all necessary notices given to the rural authority under the by-laws relating thereto. That authority, however, did not formally either approve or disapprove of these plans, but they had instituted no proceedings for penalties under the by-laws, nor had they done anything under the 98th by-law and s. 158 of the Public Health Act. Upon the transfer effected by the Act of 1900, the previous right, if any, of the rural authority to take proceedings for penalties under the by-laws was transferred to the corporation of Devonport, the plaintiffs in this action. They had not taken any proceedings before the justices for penalties, but they instituted this action, in which they claimed—(1.) an injunction to restrain the defendants from erecting or continuing the erection of any building upon and from laying out any new street intended for use as a carriage-road upon or in connection with the defendants' said estate without having previously delivered to the plaintiffs, in accordance with the said by-laws, and obtained their approval to proper plans and sections of such building and street respectively, and from laying out or constructing any such street as aforesaid so that the width thereof should be less than 36 feet, or, being a street exceeding 200 feet in length and intended to form the principal approach, or means of access to any domestic building, public building, or building of the warehouse class with a carriage-road of less than 24 feet in width or without a footway on each side thereof of a width not less than one-sixth of the entire width of such street, or otherwise in contravention of any of the provisions of the said by-laws; (2.) an order on the defendants to remove, alter, or pull down all works begun or done by the defendants as aforesaid contrary to the said by-laws or any of them; (3.) alternatively a declaration that the plaintiffs were entitled to remove, alter, pull down, or otherwise deal with any works begun or done by the defendants as aforesaid contrary to the provisions of the said by-laws or any of them.

Macmorran, K.C., *Hughes, K.C.*, and *R. J. Parker*, for the plaintiffs. The defendants are intending to lay out these two old highways as new streets. If there is evidence of an intention to do something which, when completed, will convert an old highway into a new street, then the person who begins to build pursuant to that intention begins to lay out a new street, and therefore becomes subject to the by-laws relating to new streets: *Robinson* v. *Barton-Eccles Local Board.* (1) If this were not so, the consequences would be very serious, because every narrow lane in the neighbourhood of a large town might have houses built up to the edge of it, with the result that all the miseries of narrow streets would be perpetuated. It is said, no doubt with truth, that a person does not make a new street by building one house. There must, of course, be evidence of an intention to go further: *Williams* v. *Powning.* (2) *Gozzett* v. *Maldon Urban Sanitary Authority* (3) is the strongest case against us, but it does not appear to recognise the principle of *Robinson* v. *Barton-Eccles Local Board* (1), which depends, not only upon what a man does, but upon the question whether what he is doing in pursuance of a scheme will eventually constitute a new street. The principle is fully recognised in *St. George's Local Board* v. *Ballard.* (4)

Here, it is clear that the defendants have expressed their intention to build houses along both these roads, and we submit that they have begun to lay them out as new streets, and must comply with the requirements of the by-laws.

[JOYCE J. Is this a usual mode of enforcing by-laws?]

It is not unusual: *Robinson* v. *Barton-Eccles Local Board* (1) and *Hendon Local Board* v. *Pounce.* (5)

Not only is this action within the jurisdiction of the Court, but it is a proper and convenient method of trying a question of this sort: *Cooper* v. *Whittingham* (6), *Hendon Local Board* v. *Pounce* (5), *Bromley Local Board* v. *Lloyd* (7), *Hayward* v. *East London Waterworks Co.* (8), and *Stevens* v. *Chown.* (9)

(1) (1883) 8 App. Cas. 798.
(2) (1883) 48 L. T. 672.
(3) [1894] 1 Q. B. 327.
(4) [1895] 1 Q. B. 702.
(5) (1889) 42 Ch. D. 602.
(6) (1880) 15 Ch. D. 501.
(7) (1892) 66 L. T. 462.
(8) (1884) 28 Ch. D. 138, 146.
(9) [1901] 1 Ch. 894.

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In this case the penalties are created by the by-laws themselves, and not by the statute. The statutory power to impose penalties is given to the local authority by s. 183 of the Public Health Act, 1875.

Danckwerts, K.C., and *A. Glen*, for the defendants. This action should be dismissed. What the defendants have done is to build certain houses on their own land, and unless that is prohibited by the by-laws they are entitled to do it. These houses are built in such a position that between the front walls and the other side of Tavistock Road there is a space of thirty-six feet. If the plaintiffs desire to purchase the strip of land between the houses and the defendants' fence they can do so, and throw it into the street: Public Health Act, 1875, s. 154; *Quinton* v. *Bristol Corporation*. (1)

It is admitted that under s. 157 of the Public Health Act, 1875, an old highway may be a new street; but the question is what is the effect of the by-laws. The defendants have committed no offence under the by-laws. But even if they have, the plaintiffs cannot enforce them by such an action as this without the intervention of the Attorney-General. They can only enforce their by-laws in the proper statutory method. They have no proprietary interest of any sort. Disobedience to by-laws is a criminal matter: *Mellor* v. *Denham* (2); *Wallasey Local Board* v. *Gracey* (3); *Tottenham Urban Council* v. *Williamson & Sons*. (4) No doubt where a local authority has proprietary rights, it can protect those rights by action in the ordinary manner: *Attorney-General* v. *Logan*. (5) But that is not this case. *Cooper* v. *Whittingham* (6) was a proceeding for the protection of copyright. There Jessel M.R. recognised the general rule of law, that where a new offence and a penalty for it have been created by statute nothing else can be asked for than the penalty. It is true he laid down two exceptions to that rule, one being the ancillary remedy in equity by injunction to protect a right, and the other being that created by s. 25, sub-s. 8, of the Judicature Act, 1873.

(1) (1874) L. R. 17 Eq. 524.
(2) (1880) 5 Q. B. D. 467.
(3) (1887) 36 Ch. D. 593.
(4) [1896] 2 Q. B. 353.
(5) [1891] 2 Q. B. 100.
(6) 15 Ch. D. 501.

That second exception has been held to be wrong: *North London Ry. Co.* v. *Great Northern Ry. Co.* (1) and *Kitts* v. *Moore.* (2) *Hayward* v. *East London Waterworks Co.* (3) was simply an application of the doctrine that the Court has jurisdiction to interfere in order to keep matters in statu quo pending the determination of legal rights.

Stevens v. *Chown* (4) only decided that the jurisdiction of the Court to protect a statutory right of property is not excluded by the statutory provision of a particular remedy for the infringement of that right; and in *Emperor of Austria* v. *Day* (5) it was laid down by Turner L.J. that the jurisdiction rests upon injury to property actual or prospective, and that there is no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property.

In *Institute of Patent Agents* v. *Lockwood* (6) it was held that the right mode of procedure against an unregistered patent agent was by way of summary proceeding for the penalty prescribed by rules which had the force and effect of a statute. What is laid down by Lord Herschell in that case (7) is distinctly applicable here.

In all such cases it is the statutory remedy which must be employed: *Barraclough* v. *Brown* (8); *Pasmore* v. *Oswaldtwistle Urban Council* (9); *Grand Junction Waterworks Co.* v. *Hampton Urban Council.* (10)

In neither *Hendon Local Board* v. *Pounce* (11) nor *Bromley Local Board* v. *Lloyd* (12) was the point taken.

The real meaning of these by-laws is that if any one chooses to construct or lay out a new street he must comply with the by-laws relating to that matter. The defendants have not in the widest sense constructed or laid out a new street: *Baker* v. *Portsmouth Corporation.* (13) The defendants could not lay

(1) (1883) 11 Q. B. D. 30.
(2) [1895] 1 Q. B. 253.
(3) 28 Ch. D. 138.
(4) [1901] 1 Ch. 894.
(5) (1861) 3 D. F. & J. 217.
(6) [1894] A. C. 347.
(7) [1894] A. C. 361.
(8) [1897] A. C. 615.
(9) [1898] A. C. 387.
(10) [1898] 2 Ch. 331.
(11) 42 Ch. D. 602.
(12) 66 L. T. 462.
(13) (1878) 3 Ex. D. 157.

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out or construct either of those roads without committing a trespass upon the highway: *Harrison* v. *Duke of Rutland* (1); Platt on Highways, 13th ed. p. 57. If the defendants had removed their fence and thrown the strip of land between it and their houses into the roadway they would, no doubt, have been laying out the street: *Taylor* v. *Metropolitan Board of Works*. (2) They have not infringed the by-laws: *Gozzett* v. *Maldon Urban Sanitary Authority* (3); *Williams* v. *Powning* (4); *St. George's Local Board* v. *Ballard* (5); *Davis* v. *Greenwich Board of Works* (6); *Reg.* v. *Tynemouth Rural Council* (7); *Battersea Vestry* v. *Palmer*. (8)

Macmorran, K.C., in reply. It is said that the plaintiffs have no proprietary interest such as to entitle them to maintain this action. The duty which lies upon them to enforce their by-laws constitutes a sufficient interest to entitle them to sue for an injunction to restrain their infringement. If it were not so, any one might freely infringe the by-laws of a local authority so long as he was prepared to pay the prescribed penalty. [He also referred to *Jowett* v. *Idle Local Board* (9); *Richards* v. *Kessick* (10); *Fenwick* v. *Rural Sanitary Authority of Croydon Union* (11); *Yabbicom* v. *King* (12); *Barton Regis Rural Council* v. *Stevens* (13); *Folkestone Corporation* v. *Woodward* (14), and *Clerkenwell Vestry* v. *Edmondson*. (15)]

Cur. adv. vult.

March 26. JOYCE J. (after stating the facts). Now it is alleged that the defendants prior to November 9, 1900, had commenced to lay out and construct and were then laying out and constructing Ham Lane and Tavistock Road as new streets in a manner which contravened the by-laws of Plympton and

(1) [1893] 1 Q. B. 142.
(2) (1867) L. R. 2 Q. B. 213.
(3) [1894] 1 Q. B. 327.
(4) 48 L. T. 672.
(5) [1895] 1 Q. B. 702.
(6) [1895] 2 Q. B. 219.
(7) [1896] 2 Q. B. 219, 451.
(8) [1897] 1 Q. B. 220.
(9) (1887) 36 W. R. 138; (1888) 36 W. R. 530.
(10) (1888) 57 L. J. (M.C.) 48.
(11) [1891] 2 Q. B. 216.
(12) [1899] 1 Q. B. 444.
(13) (1896) 61 J. P. 598.
(14) (1872) L. R. 15 Eq. 159.
(15) (1902) 18 Times L. R. 248.

also of the borough of Devonport. What they had really done and were doing was to erect certain houses upon their own land without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses that were being built. They have done nothing more than this. In particular they have not attempted to alter or interfere with the roadway, either of Ham Lane or Tavistock Road, and, as it appears to me, they would have been liable to be indicted and to an action for an injunction if they had done so, or had in any way intermeddled with the laying out or construction of either of these highways.

It was admitted in the course of the argument that there was no case for an injunction as to building, except if and so far as the buildings might contravene the by-laws as to the laying out of a new street. I may therefore treat paragraph 1 of the claim as a claim to an injunction to restrain the defendants from laying out Ham Lane and Tavistock Road, or either of them, as new streets or a new street in contravention of the by-laws, and the question is whether the defendants have commenced or threatened or intended to do this.

Now, were the defendants laying out or constructing Ham Lane and Tavistock Road, or either of them, or any part thereof as new streets or a new street within the meaning of the by-laws in reference to the laying out or constructing of new streets? It is clear that there has not been any laying out or constructing by the defendants of a new street in the ordinary, popular, and natural sense of the words, and that the defendants never intended to do anything of the kind. In fact, it was the one thing of all others which they intended not to do. They have not done, and had no power to do, anything outside the fences of their own land. They have simply begun to build within their own boundary. No ordinary person would think of saying that what they were doing was laying out or constructing a new street, although for anything I know the effect of what the defendants are doing, in conjunction with what other people are doing or may do on the opposite side of Tavistock Road, may be that at some future time the portion

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of Tavistock Road adjoining the defendants' property may be or become a street or even a "new street" within the meaning of that term in some Act of Parliament or statutory by-law. The word "street" has various significations in different Acts of Parliament, but primâ facie the meaning of the word "street" in the by-laws, as well of Plympton as of Devonport, with respect to the laying out and construction of new streets is, in my opinion, limited to what is used or intended to be used as roads, and my reasons for this view are those stated by Lord Selborne L.C. in *Robinson* v. *Barton-Eccles Local Board*. (1) I am unable to see how what the defendants have done or are doing is laying out or constructing a new street or anything of the kind within the meaning of the by-laws, unless there be some judicial decision which compels me so to hold. I do not think there is any such decision. On the contrary, *Williams* v. *Powning* (2), *Gozzett* v. *Maldon Urban Sanitary Authority* (3), and *St. George's Local Board* v. *Ballard* (4), appear to me to support the conclusion which I have stated. As to paragraph 1, therefore, of the relief claimed, the case of the plaintiffs in my opinion fails upon the merits; and as to paragraphs 2 and 3, which are in very general terms, it would suffice for me to say that the defendants have not been shewn to have contravened any by-law.

But an objection was raised, and it is contended on behalf of the defendants that the by-laws in question, and any similar by-laws, cannot be enforced in this Court by an action on the part of the authority for an injunction, but only by the special remedies, namely, proceeding for penalties, and the removing of work done contrary to the by-laws (Nos. 97 and 98 of Plympton, and 110 and 105 of Devonport) as provided by the statute and by-laws, or otherwise by an action formerly called an information on the part of the Attorney-General. It is obvious that by any breach of these by-laws the authority, as such, does not sustain any damage, none of its rights of property are interfered with, and the public alone are injured, if at all. It appears, however, that in various cases injunctions have

(1) 8 App. Cas. 798.
(2) 48 L. T. 672.
(3) [1894] 1 Q. B. 327.
(4) [1895] 1 Q. B. 702.

been granted at the instance of local authorities to restrain an infringement or contravention of by-laws; and I may mention particularly *Hendon Local Board* v. *Pounce* (1) and *Bromley Local Board* v. *Lloyd.* (2) The action of *St. George's Local Board* v. *Ballard* (3), previously mentioned, which was for an injunction to restrain the defendant from laying out or constructing a new street of less width than thirty-six feet, contrary to the by-laws of the plaintiffs, was dismissed on the merits; so no order was there made. In none of these cases, however, does any such objection appear to have been taken to the right of the plaintiffs to maintain the action as is now insisted upon.

In the first place it is clear, I think, that no breach of the by-laws constituted an offence or gave a right of action at common law. But any breach of the by-laws is a criminal matter, as was held in *Mellor* v. *Denham* (4) in reference to the contravention of the by-laws of a school constituted under the Elementary Education Act, 1874.

In *Doe* v. *Bridges* (5) it is laid down by Tenterden C.J. that "where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case." This was cited and approved by Lord Halsbury and Lord Macnaghten in *Pasmore* v. *Oswaldtwistle Urban Council.* (6) In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (7) the judgment of Willes J. contains the following passage: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute

(1) 42 Ch. D. 602.
(2) 66 L. T. 462.
(3) [1895] 1 Q. B. 702.
(4) 5 Q. B. D. 467.
(5) (1831) 1 B. & Ad. 847, 859; 35 R. R. 483.
(6) [1898] A. C. 394, 397.
(7) (1859) 6 C. B. (N.S.) 336, 356.

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contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue." In *Cooper* v. *Whittingham* (1) Jessel M.R. says: "There was a point not insisted upon, but mentioned during the course of the argument. It was said that the 17th section of the Act created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right." That has no application to this case. Then he says: "The second exception is that created by the Judicature Act, s. 25, sub-s. 8, which enables the Court to grant an injunction in all cases in which it shall appear to the Court to be just or convenient." In my opinion, however, after the decision in *North London Ry. Co.* v. *Great Northern Ry. Co.* (2) (see also *Kitts* v. *Moore* (3)), *Cooper* v. *Whittingham* (1) is not any authority for granting an injunction in such a case as the present. At all events it would not be just or convenient to do so, and for that I would refer to what Stirling J. said in the case of the *Grand Junction Waterworks Co.* v.

(1) 15 Ch. D. 501, 506. (2) 11 Q. B. D. 30.
(3) [1895] 1 Q. B. 253.

Hampton Urban Council (1): "Now, whether or no there be jurisdiction in the Court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case: 'Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction.' I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive one. I think, therefore, that, in the exercise of the discretion which is vested in the Court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as a proper mode of proceeding"—of course, that is not exactly the same case as this, because an injunction was sought against proceeding before the bench—"and a fortiori it seems to me that when the Court is simply asked to make a declaration of right, without giving any consequential relief, the Court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances." Then he said that that was a case in which, in the exercise of its discretion, the Court ought not to interfere in that way.

(1) [1898] 2 Ch. 331, 345.

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In the case of *Institute of Patent Agents* v. *Lockwood* (1) Lord Herschell says: "But that does not really conclude this case. The further question remains which was dealt with in some subsequent observations of one of the learned judges, Lord Young, whether even assuming that the rule is bad, assuming that the name of the defender was properly erased, assuming that he had no right to practise as a patent agent, assuming that by doing so he rendered himself liable to the penalty prescribed, it is open to the Institute of Patent Agents and three practising patent agents to come to the Court of Session and ask for the conclusions to be found in the summons of the pursuer. My Lords, upon that I confess, with all deference to the Lord Ordinary, I cannot but entertain a very strong opinion. You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature having created that new offence, has prescribed the punishment for it, namely, a penalty of 20*l.* Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a 20*l.* penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and, then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the 20*l.* penalty, but would be liable to imprisonment for breach of the interdict? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to shew that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences

(1) [1894] A. C. 347, 361.

which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison." All that, as it seems to me, applies to the proceedings in the present case.

Upon the whole, then, I am of opinion that this action could not be maintained by the urban authority, even if it had been right upon the merits.

In regard to paragraph 3 of the claim for relief which asks for a declaration, the case of *Barraclough* v. *Brown* (1) is an authority, I think, that no such declaration ought to be made, and I have already read what Stirling J. said in the case of the *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (2) in reference to making declarations of right under similar circumstances.

The result is that in my opinion this action is altogether misconceived, and must be dismissed with costs.

Solicitors for plaintiffs: *Cunliffes & Davenport, for A. B. Pilling, Devonport.*

Solicitors for defendants: *Surr, Gribble & Oliver, for J. Walter Wilson, Plymouth.*

(1) [1897] A. C. 615.

(2) [1898] 2 Ch. 331.

G. A. S.

JOYCE J.

1901

Oct. 29.

1902

Feb. 10; *March* 22; *April* 19.

In re GREENWOOD. GOODHART *v.* WOODHEAD.

[1901 G. 715.]

Will—Devise of Real Estate—Condition that Devisee should take and use Testator's Name—Preceding Life Estate—Lunacy and Death of Devisee during Life of Tenant for Life—Non-performance of Condition—Condition Precedent or Subsequent—Remainder in Fee—Vesting.

Testator by his will, dated in 1853, devised his real estate to his daughter for life, and after her death for her children; and if she should have no child the testator devised his real estate to N., on condition that he should take and use the testator's name only. The testator died in 1853. His daughter, who was now in her fifty-ninth year, was married, but had had no issue. N. died in 1855 without having taken the testator's name. For eighteen months previous to his death he had suffered from insanity, and for six months previous to his death had been in an asylum:—

Held, that whether the condition were precedent or subsequent, its performance had not been rendered impossible by the act of God; and that N. having failed to perform it, the devise to him could not take effect.

In this case the testator, James Newsome Greenwood, by his will dated May 24, 1853, devised his real estate to trustees upon trust for his daughter Jane during her life for her separate use, and after her death upon trust for her children or remoter issue born in her lifetime as she should appoint, and, in default of appointment, upon trust for all her children, or her only child, if but one. And, if she should have no child, the testator devised his real estate to his cousin, William Alexander Newsome, his heirs and assigns, on condition nevertheless that in case the testator's wife should be then living she should have the use and enjoyment for the then remainder of her life of the dwelling-house in which the testator then resided, and on further condition nevertheless that he take and use the name of Greenwood only, but subject to the payment of certain legacies therein mentioned.

The testator died on August 11, 1853, and his wife was also dead.

The testator's daughter Jane was now the wife of Jeremiah

William Woodhead. She had had no issue, and was now in her fifty-ninth year.

W. A. Newsome died intestate on November 5, 1855, leaving his only son, Colonel W. Newsome, his heir-at-law. Colonel Newsome died on July 26, 1900. The plaintiff was his administrator with the will annexed, and for the purpose of passing his administration accounts it became necessary (as it was alleged) to ascertain the value of the interest, if any, which Colonel Newsome took in the real estate devised by the will of J. N. Greenwood.

This summons was accordingly taken out by the plaintiff against the trustees of the will of J. N. Greenwood and Mrs. Woodhead, the testator's heiress-at-law, and her husband, for a declaration that the plaintiff, as the legal personal representative of Colonel Newsome, was entitled to the real estate devised in trust by the will of the testator in remainder after the death of Mrs. Woodhead without children, subject to the payment of the legacies therein mentioned.

Badcock, K.C., and *E. S. Ford*, for the plaintiff. The question is whether this condition as to taking the name of Greenwood is a condition precedent or a condition subsequent. We submit that, having regard to the nature of the condition and to its position in the will, it is a condition subsequent. The position of this condition is important, because it is interposed between two conditions which are clearly subsequent, and the inference is that the testator intended this condition also to be a condition subsequent. The language of the condition leaves the question doubtful, and primâ facie the Court will not read a doubtful condition as a condition precedent: Jarman on Wills, vol. ii. 5th ed. pp. 842, 843, 847; *Egerton* v. *Earl Brownlow*. (1) Further, the nature of this condition is such that it is unlikely that the devisee was intended to perform the condition while the gift was contingent: *Woodhouse* v. *Herrick* (2); *Gulliver* v. *Ashby* (3); and see Davidson's Conveyancing Precedents, vol. iii. Pt. I. 3rd ed. p. 357, n. A

(1) (1853) 4 H. L. C. 1, 182, 183. (2) (1855) 1 K. & J. 352.
(3) (1766) 4 Burr. 1929, 1940.

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condition may be subsequent though the estate which it is to defeat is contingent: *Egerton* v. *Earl Brownlow.* (1)

Here no time is fixed for fulfilment, and it cannot be presumed that the testator intended that the devisee should change his name for the sake of a contingent gift. The result is that the condition is to be fulfilled after taking the estate: see *Davies* v. *Lowndes.* (2) But the death of the devisee during the contingency has rendered that impossible. This being a condition subsequent which has become impossible by the act of God, the condition falls and the gift remains: Theobald on Wills, 5th ed. p. 541; *Graydon* v. *Hicks* (3); *Sutcliffe* v. *Richardson* (4); *Collett* v. *Collett.* (5)

Hughes, K.C., and *E. Clayton*, for Mrs. Woodhead. This is a condition precedent. The fair reading of this condition is that the devisee is not to take the property unless he either has taken the name during the lifetime of the tenant for life or takes it on her death. Upon the plaintiff's view the devisee might take the estate and never fulfil the condition at all, because, there being no time fixed for its fulfilment, until he dies it cannot be said that he has not fulfilled it. The object of the testator was that the owner of the estate should bear his name, and according to the plaintiff's construction that object is defeated: *Roundel* v. *Currer* (6); *Cary* v. *Bertie* (7), which was, however, compromised in the House of Lords; *Acherley* v. *Vernon.* (8) The argument based upon the position of the condition comes to nothing, because the provision in favour of the testator's wife is not really a condition, but is in the nature of a limitation. If this is a condition precedent, the result of the condition having become impossible is that the gift fails.

But assuming that this is a condition subsequent, it has not become impossible by the act of God, because the devisee, who survived the testator, might have performed the condition in his lifetime.

(1) 4 H. L. C. 1, 158, 188.
(2) (1835) 1 Bing. N. C. 597, 618; 2 Scott, 71, 103; 53 R. R. 266.
(3) (1739) 2 Atk. 16, 18.
(4) (1872) L. R. 13 Eq. 606.
(5) (1866) 35 Beav. 312.
(6) (1786) 2 Bro. C. C. 66; 1 Sw. 383, n.
(7) (1696) 2 Vern. 333.
(8) (1739) Willes, 153, 158.

[They also referred to *In re Farrer and Champion.* (1)]
O. L. Clare, for the trustees of the will.
Badcock, K.C., in reply.

Cur. adv. vult.

Feb. 10. JOYCE J., after referring to the will, continued as follows:—The first condition as to use and enjoyment, &c., is not a condition properly so called, but, according to the authorities, is construed as a charge or trust for the benefit of the widow, or a reservation or exception in her favour out of the devise. I proceed to consider the second condition, namely, that the devisee take and use the name of Greenwood only. The testator's daughter Jane is married to Jeremiah William Woodhead. She is in the fifty-ninth year of her age and childless, and the question has been raised what, in the event that will doubtless happen, of no child being born to her, is or will be the effect of the limitation I have mentioned, the subject thereof being real estate, and real estate only, and the testator's cousin William A. Newsome, the devisee in remainder, being dead without having taken or used the name of Greenwood. Strictly, perhaps, it is a future question, but the persons entitled in any view of the case are in existence, and desire to have the question decided. I think it will be expedient and proper to decide it.

The contention on behalf of the testator's daughter, who is also his heiress-at-law, is that the condition imposed, of taking and using the name of Greenwood only, was a condition precedent properly so called—in which case it would be clear beyond question that the remainder in fee to William A. Newsome, which was contingent if the condition be precedent, never could become vested, and that she as such heiress-at-law is or will be entitled to the reversion in fee upon her own life estate in default of the birth of issue to her.

On the other hand it is contended, on behalf of the representatives of W. A. Newsome, that this condition was not precedent, but a condition subsequent, that the remainder in fee to W. A. Newsome was, as it would then be, a vested remainder in him subject to the possibility of its being defeated or

(1) W. N. (1887) 202.

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displaced by the birth of issue to Mrs. Woodhead, and to the consequences, whatever they might be, of the condition not being fulfilled, and further that, inasmuch as W. A. Newsome has died in the lifetime of Mrs. Woodhead, the performance of this condition subsequent has become impossible by the act of God, so that W. A. Newsome's remainder in fee cannot fail or be divested by reason of his failure to comply with the condition.

The law upon the subject of estates upon conditions is to be found fully stated in Preston on Estates, vol. i. c. 1, and in the same author's edition of Sheppard's Touchstone, cap. vi., and the difference between a condition precedent and a condition subsequent is most clearly stated in Jarman on Wills, vol. ii. 5th ed. p. 842.

The particular condition in question is an affirmative or positive condition, requiring an act to be done by the devisee which might have been performed instanter, or at any time without the consent or concurrence of any other person being necessary, for, whatever may be the law as to armorial bearings, any person may at any time take and use any name he pleases: Davidson's Conveyancing Precedents, vol. iii. Pt. I. 3rd ed. p. 357, n.; see also per Lord Lindley in *Earl Cowley* v. *Countess Cowley* (1), and in *Davies* v. *Lowndes* (2), per Tindal C.J. There is no gift over, or express defeasance in the event of refusal or failure to comply with the condition. All these are circumstances which have been considered to favour the conclusion that such a condition is precedent.

Above all, however, no period is expressly allowed or limited for the performance of the condition. If it had been to "take and use the name of Greenwood only" within or on or before the expiration of twelve months after acquiring the possession or enjoyment of the estate, the condition would in my opinion have been subsequent; so that if W. A. Newsome had died before coming into possession, or within the twelve months, there would have been good grounds for contending that the condition had become inoperative and might be disregarded.

Now, the question whether a condition annexed to a devise be precedent or subsequent depends upon the intention, and

(1) [1901] A. C. 450, 460. (2) 1 Bing. N. C. 597, 618; 53 R. R. 266.

there is no doubt that if it be possible for the Court to hold it to be subsequent this construction is preferred to the view that it is a condition precedent. In the case of *Woodhouse* v. *Herrick* (1) Wood V.-C. decided that a devise in remainder to children, "but all the sons to take the name and arms of James Woodhouse in addition to their own name," was a condition subsequent. There, however, the condition required arms to be taken as well as a name: see also *Bennett* v. *Bennett* (2), per Kindersley V.-C.

If the condition be subsequent, the subject being real estate, no gift over was necessary to make the condition effectual; the testator's heir would become entitled on breach of the condition.

But now, without determining whether the condition in question here be a condition precedent or a condition subsequent, let us consider how the matter would have stood if Mrs. Woodhead had died without issue in the lifetime of W. A. Newsome. Even if the condition were precedent, and the remainder to W. A. Newsome contingent, it appears to me that, having regard to the position of the legal estate under this will, the remainder to W. A. Newsome would not have failed by reason of the determination of the prior life estate in Mrs. Woodhead before compliance with the condition. It is possible, but I think improbable, that in the event supposed, of Mrs. Woodhead dying without issue in the lifetime of W. A. Newsome, he might have been called upon to perform the condition within a convenient or reasonable time, though it be not a condition for the benefit of or concerning any third person who could have called for its fulfilment. Perhaps, however, the heir could have done so. Still though upon the whole I think that it would have sufficed, and been a compliance with the condition by W. A. Newsome, if he had taken and used the name of Greenwood only at any time during his life: *Randal* v. *Payne* (3), though he would not have been entitled to the possession or enjoyment of the land unless he complied with the condition if precedent.

Let us suppose further that W. A. Newsome had subsequently died without having taken or used the name of

(1) 1 K. & J. 352.
(2) (1864) 2 Dr. & Sm. 266, 275.
(3) (1779) 1 Bro. C. C. 55.

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Greenwood. Could it then have been said that the performance of the condition had been rendered impossible by the act of God, so that he was excused, and that his remainder in fee simple had become absolute? It would rather, as it seems to me, have become impossible—if this term could properly be applied in such a case—by the devisee's own default, not by the act of God, which has been defined to be an accident presumably impossible to foresee or guard against reasonably. The consequence of holding that in the event just stated the condition had become inoperative would be, that every condition to be personally performed by a devisee upon condition must upon his death before compliance be considered to have become impossible by the act of God, and so, if a condition subsequent, need never be performed at all, and might from the first have been wholly disregarded.

To return to the actual facts of this case. The devisee, W. A. Newsome, has died in the lifetime of the preceding tenant for life. Although not required to comply with the condition during the existence of the preceding life estate, I do not doubt that he could have done so, just as much as if the condition had been to marry an Englishwoman, or go to Rome, and that if he had, immediately after the testator's death, taken and used the name of Greenwood only, his estate in fee simple in remainder would have become absolutely vested in interest, subject only to the possibility of its being defeated or displaced by the birth of issue to Mrs. Woodhead, the tenant for life. The actual possession and enjoyment must of course have been postponed until her death.

A contingent interest, and a fortiori an estate vested in interest though not in possession, is capable of being operated upon by a condition subsequent and being made to cease and become void: *Egerton* v. *Earl Brownlow*. (1) See also *Lambarde* v. *Peach* (2) and *In re Muggeridge's Trusts*. (3)

Upon consideration of the authorities, I have come to the conclusion that if a condition be one to be performed by the devisee personally, not at a particular time, but in effect at any time he pleases, and not requiring the intervention or concurrence of any other person, no period being expressly allowed or

(1) 4 H. L. C. 1. (2) (1859) 4 Drew. 553. (3) (1860) Joh. 625.

limited for its performance which may possibly outlast the life of the devisee, (as, e.g., twelve months after coming into possession, and the like), the period for the performance of the condition is naturally and necessarily the life of the devisee and no longer, and the condition is not complied with, in fact is broken, if the devisee dies without having performed it: see *Acherley* v. *Vernon.* (1) The result, if I am right so far, is that the condition in the present case (whether it be precedent or subsequent) is one which might have been performed by the devisee immediately, or at any time during his life, without the consent or concurrence of any other person; it never became impossible by the act of God, in the technical sense of that expression. But the period for performing it has simply been allowed to pass, and the devisee has failed to perform it, having only himself to blame for his default.

As I said at first, if the condition be precedent, there is no question; for the devise of the fee in remainder could not now ever vest, and has failed. And I do not see that W. A. Newsome, or rather his representatives, can, under the circumstances, be in any better position even if the condition be held to be subsequent. For at the moment of his death without having performed the condition, the devise of the remainder which, if the condition be held to be subsequent, was vested has failed, and the heir, Mrs. Woodhead, there being no express gift over, became entitled to the remainder or reversion upon her own life estate, subject to the possibility of a child being born to her who would become entitled under the preceding contingent limitation. It appears to me that as matters stand the plaintiff could not succeed unless he could establish each of two things, namely, (1.) that the condition in question was not a condition precedent, but subsequent; and (2.) that the performance of the condition became impossible by the act of God, and not by the mere default of the devisee, W. A. Newsome. He cannot, in my opinion, shew the latter, whatever may be the true view as to the former. It therefore follows that this action fails, and must be dismissed.

(1) Willes, 153.

H. B. H.

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After the delivery of this judgment it was ascertained that W. A. Newsome had died in a lunatic asylum, into which he had been admitted on April 26, 1855, and that previously to his admission he had suffered from an attack of insanity which was alleged to have commenced in April, 1854.

In those circumstances, upon the application of the plaintiff and by the leave of the Court, the case was restored to the paper for further argument upon the question whether, having regard to the facts as to the insanity of W. A. Newsome, any different judgment ought to be pronounced.

March 22. *Badcock*, *K.C.*, and *E. S. Ford*, for the plaintiff. It now appears that W. A. Newsome was for some time before his death incapacitated by lunacy from fulfilling the condition. It was held in *In re Bird* (1), under similar circumstances, that lunacy was an act of God, making performance of the condition impossible, and that, the condition being subsequent, the legatee was entitled. This is a stronger case, because in *In re Bird* (1) the legatee had lucid intervals during which he might have performed the condition. Here it was not so. Here, before the expiration of the period during which the condition might have been performed, namely, the period of the life of the devisee, the act of God supervened and prevented him from performing it. That must materially affect the judgment which your Lordship has pronounced, because it is clear that the performance of the condition became impossible by the act of God, and not owing to the default of the devisee.

Hughes, *K.C.*, and *E. Clayton*, for Mrs. Woodhead. There is no evidence that W. A. Newsome, even during his detention in the asylum, was incapable of performing the condition. But from August, 1853, to April, 1854, he was clearly capable of doing so, and if he had died at the last-mentioned date without performing the condition he would have been precluded from taking the estate. He had, at any rate, some time to perform the condition. *In re Bird* (1) is distinguishable because there there was a fixed period for the performance of the condition.

(1) (1894) 8 R. 326.

[JOYCE J. Suppose W. A. Newsome had been a lunatic at the time of the testator's death.]

It is not clear that it would be impossible for a lunatic to change his name by his committee.

In *Acherley* v. *Vernon* (1) it was held that, if the condition there in question had been subsequent, the legatee could not have recovered, for that the condition ought to have been performed within a reasonable time.

The evidence as to lunacy does not affect the judgment already pronounced, because in that judgment your Lordship has held that, although W. A. Newsome predeceased Mrs. Woodhead, it was not by the act of God rendered impossible for him to perform the condition. If he had died when he became lunatic, the decision would have been the same, and the fact of the lunacy having supervened makes no difference.

O. L. Clare, for the trustees. Assuming that the lunacy was an act of God which made it impossible for W. A. Newsome to change his name, the only result was that it became impossible as from April, 1854. There is no reference in the condition to the period of his life. In order to take the estate he had simply to perform the condition, which he failed to do.

Badcock, K.C., in reply. The condition in *Acherley* v. *Vernon* (1) was precedent. [He also referred to *Davies* v. *Lowndes.* (2)]

Cur. adv. vult.

April 19. JOYCE J. I am by no means certain that the condition in the present case was not a condition precedent. If subsequent, however, it was not to be performed upon a particular day, nor was any definite period fixed or allowed by or within which it was to be fulfilled.

I do not consider it to be proved as a matter of fact that W. A. Newsome was actually incapacitated to perform the condition by the lunacy with which he was afflicted during the last eighteen months of his life. But the law with respect to conditions affecting real estate is more stringent in reference to performance than it is with respect to legacies and personal estate. In a case like the present, where the condition imposed

(1) Willes, 153. (2) 1 Bing. N. C. 597; 53 R. R. 266.

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upon the devisee is simply to do something which could be done at once (no particular time being expressly fixed or allowed), and required no consent or concurrence on the part of any other person, I am not aware of any authority for holding that the subsequent affliction of the devisee by either mental or physical infirmity excuses him from the obligation of performance.

If I am right in my original judgment, it is quite immaterial that the infirmity supervened during the lifetime of the testator's daughter. It would furnish no better excuse then than it would have done after her decease. Everybody must die at some time. Many, if not most, die by disease that wholly incapacitates them to transact business for some, it may be for a long, period before actual death. Is this such an extraordinary accident or event as must be considered impossible to have been within the contemplation of the testator? Was the obligation imposed conditional upon the mental capacity of the devisee continuing down to the moment of his decease? If a person whose life is prematurely cut short by sudden accident is not to be excused, I do not see why one who survives to an extraordinary old age in second childishness ought to be excused, if only his incapacity became great enough for some period before his decease. It is no more reasonable that insanity or premature decay of mind should excuse than that death itself should have that effect.

In cases of contract a party who, but for his own delay, might have performed his obligation before it became impossible, cannot afterwards resist an action for non-performance on the ground of impossibility. It is not suggested that W. A. Newsome was not perfectly competent for at least nine months after the testator's death, when the remainder in fee vested in him, if the condition was, as it is contended, a condition subsequent.

The result is that, in my opinion, the fact of the lunacy ought not to make any difference in the result of my judgment, and the action must nevertheless be dismissed.

Solicitors: *Robins, Hay, Waters & Hay; Jaques & Co., for Watts & Son, Dewsbury.*

G. A. S.

In re THE SPIRAL GLOBE, LIMITED (No. 2). WATSON *v.* THE SPIRAL GLOBE, LIMITED.

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April 17, 19.

[1901 S. 2443.]

Company—Debentures—Registration—Creation of Charge—Resolution to issue Series of Debentures—Sealing—Issue—Companies Act, 1900 (63 & 64 *Vict.* c. 48), s. 14.

In August, 1900, a company resolved at a meeting of its directors to issue at par twenty debentures of 100*l.* each bearing interest at 6 per cent. and redeemable at twelve months from date of issue. On August 31, 1900, the twenty debentures were sealed with the company's seal. By the debentures the company charged with the payment of principal and interest thereon its undertaking and all its property by way of floating charge. Ten of these debentures were issued in September, 1900, but the remaining ten were retained in the possession of the company, and not issued until January 5, 1901, at which date the Companies Act, 1900, was in force. Sect. 14 of that Act provides for the registration of mortgages or charges "created" by a company after the commencement of the Act:—

Held, that the debentures issued on January 5, 1901, did not require registration under the Act.

THE defendant company was incorporated in 1897 as a company limited by shares under the Companies Acts, 1862–1893.

By a resolution of the board of directors, dated August 28, 1900, it was resolved to issue at par a series of twenty debentures of 100*l.* each bearing interest at 6 per cent. and redeemable in twelve months from the date of issue. At a similar meeting held on August 31, 1900, a form of debenture to bearer was approved, and it was resolved that the seal of the company be affixed to the twenty debentures, and the same were sealed accordingly. The debentures ranked pari passu and were charged upon the whole of the assets and undertaking of the company by way of floating charge.

On September 24, 1900, the company issued to the plaintiffs, who were the bankers of the company, ten of the said debentures, numbered 1 to 10, for the purpose of securing the sum of 1000*l.* that day advanced by them to the company; but

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the remaining ten debentures, numbered 11 to 20, were not then issued. At a meeting of the directors, held on January 3, 1901, it was resolved that the ten debentures, numbered 11 to 20, should be issued to and deposited with the plaintiffs as security for an overdraft to be arranged, and on January 5, 1901, the said ten debentures were so deposited accordingly.

On April 18, 1901, the company passed a special resolution for voluntary winding-up. On July 3, 1901, the plaintiffs, on behalf of themselves and all the holders of debentures in the defendant company, commenced this action for the purpose of enforcing the debentures, and on July 30, 1901, the usual judgment was pronounced.

In prosecuting the inquiries directed by the judgment, the question was raised as to whether the ten debentures numbered 11 to 20 and issued on January 5, 1901, ought not to have been registered in pursuance of s. 14 of the Companies Act, 1900. That section provides (inter alia) as follows: (1.) "every mortgage or charge created by a company after the commencement of this Act and being either—(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; or (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation. . . . (4.) Provided that where a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled pari passu is created by a company, it shall be sufficient to enter on the register—(*a*) the total amount secured by the whole series; and (*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (*c*) a general description of the property charged; and (*d*) the names of the trustees, if

any, for the debenture-holders. . . . (5.) Where more than one issue is made of debentures in the same series, the company may require the registrar to enter on the register the date and amount of any particular issue, but an omission to do this shall not affect the validity of the debentures issued. (6.) The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, . . . and the company shall cause a copy of the certificate so given to be indorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered."

Upon an application under s. 15 of the Companies Act, 1900, an order was made by Swinfen Eady J. extending the time for registration, but "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered": see *In re Spiral Globe, Limited.* (1) That order was made upon the assumption that the debentures required registration under the Act; but the question was now raised, upon further consideration of the action, whether under the circumstances registration was in fact necessary.

Romer, for the plaintiffs. These debentures were created before the commencement of the Companies Act, 1900, and do not therefore require registration thereunder. Directly the seal of the Company was affixed to the debentures a charge was created within the meaning of s. 14 of the Act. It is analogous to a charge given to secure future advances or a charge given to bankers to secure a current account.

The charge is created by the company; the act of issue has nothing to do with the creation of the charge. If one of these debentures had been stolen before being issued, and had got into the hands of an innocent holder for value, it would have been a good charge upon the property of the company. In s. 14 the word "creation" is used in contradistinction to the word "issue." Sub-s. 4 contemplates the registration of the whole series of debentures, whether issued or not. There

(1) [1902] 1 Ch. 396.

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is no provision in the Act for the registration of a partial issue. Sub-s. 5 is permissive, and under that sub-section the omission to register does not affect the validity of the debentures. In Palmer on the Companies Act, 1900, it is stated that the meaning of sub-s. 5 is, that although some of the debentures of a series are issued at one time, and others at other times, one registration under the sub-section shall be sufficient. The operation of a deed is not suspended by the fact that the party who executes it retains it in his own custody: Elphinstone on the Interpretation of Deeds, p. 120; *Roberts* v. *Security Co.* (1); *London Freehold and Leasehold Property Co.* v. *Baron Suffield.* (2)

Harold Simmons, for the liquidator. The debentures did not create a charge until they were issued. In the cases cited, relating to deeds, everything was complete except some formality. The word "created" in s. 14 is equivalent to "issued." That being so, the mere sealing of the debentures did not amount to an "issue" of them: *Clarke's Case* (3); *Mowatt* v. *Castle Steel and Ironworks Co.* (4)

The unissued debentures did not create a mortgage or charge within s. 14. They might have done if there had been a trust deed in which the property of the company was comprised.

[JOYCE J. Supposing that what happened had been in 1901 instead of in 1900, could not the whole series have been properly registered under sub-s. 4?]

Possibly it could. The word "created" as used in sub-s. 1 has a different meaning to that which it has in sub-s. 4. Sub-ss. 4 and 5 refer to the case of an issue of debentures under a trust deed, with provision for a further issue in the event of the acquisition by the company of further property. Where there is no trust deed, no charge is created until the debentures are actually issued. Under s. 14 the company must register any mortgage or charge as soon as it becomes a mortgage or charge.

W. F. Hamilton, K.C., amicus curiæ, referred to *In re*

(1) [1897] 1 Q. B. 111.
(2) [1897] 2 Ch. 608.
(3) (1878) 8 Ch. D. 635.
(4) (1886) 34 Ch. D. 58.

Abrahams & Sons, Limited (1), and to the form of registration set out in Palmer on the Companies Act, 1900, 2nd ed. p. 105.

Romer, in reply. In *In re Abrahams & Sons, Limited* (1), the point was assumed. By sub-s. 6 a copy of the registrar's certificate of registration is to be indorsed on every debenture issued by the company; and s. 18 prescribes a penalty for non-compliance with the requirements of the Act. The company is bound to register before the issue of a single debenture. The Inland Revenue authorities require all debentures to be stamped although they may not be issued.

Cur. adv. vult.

April 19. JOYCE J. The provisions in the Act of 1900 as to the registration of debentures and mortgages do not appear to have been well drawn. There are various inaccuracies of expression in the terms used, and they present considerable difficulties of construction, so much so that commentators upon the Act have been compelled to say that the true interpretation cannot be arrived at by construing the words literally. After perusing the Act in connection with the prescribed forms, having regard generally to the distinction which the Act makes between the creation of a charge and the issue of a debenture, and particularly to sub-s. 6 of s. 14, which requires a copy of the certificate of registration to be indorsed on the debenture before issue, I have come to the conclusion that, if the Act had been in force in 1900, under the particular circumstances of this case, the proper registration ought to have been effected in September, 1900. But the Act did not come into operation until January 1, 1901. Therefore, in my opinion, no registration of these debentures was required.

Solicitor: *John J. Hands.*

(1) W. N. (1902) 37; since reported [1902] 1 Ch. 695.

G. A. S.

SWINFEN EADY J.

1902

March 6, 7, 19.

In re HIGHETT AND BIRD'S CONTRACT.

[1891 H. 3891.]

Vendor and Purchaser—Leasehold House—Title—Open Contract—Breach of Covenant to Repair—Production of Receipt for Rent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 4.

The defendant on July 1, 1901, entered into an open contract with the plaintiff for the purchase of a leasehold house. The lease contained a covenant by the lessee to keep the house in good repair. No time was fixed for completion, but the Court held that November 6 was the date on which the title was cleared up and the purchaser might have taken possession. On September 27 the vendor was served with a notice from the London County Council requiring him to pull down or render secure a part of the premises as being a dangerous structure. On November 9 the vendor was served with an order of the police court requiring him to do the repairs mentioned in the notice within fourteen days. This summons was taken out by the vendor for a declaration that the expense of complying with the order ought to be borne by the purchaser:—

Held, that, the contract being open, the purchaser was entitled to proof that all the covenants in the lease had been performed up to November 6; that s. 3, sub-s. 4, of the Conveyancing Act, 1881, which requires the purchaser, on production of the receipt for the last payment of ground rent, to assume that all covenants have been performed, "unless the contrary appear," did not apply, for the contrary did appear; and that the vendor must pay the cost of complying with the order.

In July, 1901, Alfred John Bird entered into a contract with William Highett to purchase a leasehold house, No. 142, Friern Road, East Dulwich, held for an unexpired term of about eighty years at a ground rent of 7*l.* per annum, for 365*l.* The lease contained a covenant by the lessee to keep the buildings in good and substantial repair. The contract was an open one, contained in letters the last of which was written by the vendor on July 1, 1901. The contract fixed no date for completion, but on August 28, 1901, the parties agreed that the purchase should be completed on September 27, 1901.

On September 21 the purchaser wrote to the vendor that the premises were out of repair, and required him to remedy this breach of covenant.

On the evening of September 27, 1901, the tenant of the house brought to his landlord, the vendor, a notice in writing

left upon the premises the day before by the County Council under the London Building Acts, requiring the owner or occupier forthwith to take down or underpin or otherwise render secure the front bay of the structure known as 142, Friern Road, East Dulwich, and to shore up the whole structure.

It appeared that the purchaser had himself given notice to the ground landlord that the house was out of repair, and, when he did not interfere, had set the local authority in motion.

This notice was not complied with, and on November 1 an order was made by the Lambeth Police Court, under the London Building Acts, requiring the owner or occupier to do the work mentioned in the notice to the satisfaction of the district surveyor within fourteen days from the service of the order. This order was served on the vendor on November 9, 1901.

Meanwhile requisitions had been delivered by the purchaser and answered by the vendor, and there had been a long correspondence between the solicitors as to the sufficiency of the answers. In the result, as the Court found, the last requisition was disposed of and the answer thereto accepted on November 6, 1901.

On December 10, 1901, the vendor took out this summons, under the Vendor and Purchaser Act, asking for a declaration that the purchaser was not entitled to require him to bear the expense of complying with the order of the police court.

Eve, K.C., and *E. Ford*, for the vendor. The outgoings fall upon the purchaser directly a good title is shewn, i.e., when he may safely take possession. The purchaser says that four requisitions were outstanding at the crucial date. But they were all answered in any case by November 1. The order to repair was not served until November 9. At that time it is clear that the purchaser might have safely taken possession, and as there is no express contract the purchaser is bound to pay all charges and outgoings up to that date: *Barsht* v. *Tagg*. (1) But the expenses of doing the work did not become

(1) [1900] 1 Ch. 231.

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a charge upon the premises until the work was completed: *In re Bettesworth and Richer* (1); *Stock* v. *Meakin* (2); and that was long afterwards. The charge cannot be an outgoing till the work is completed: *In re Leyland and Taylor's Contract.* (3)

[SWINFEN EADY J. How do you get out of *Tubbs* v. *Wynne.* (4)]

In that case there was a notice pending at the date of the contract, and there was a special condition reserving to the vendor the right to comply with it. Moreover, the order was made and the time fixed for compliance had nearly expired at the date fixed for completion. The existing breach of the covenant to repair cannot be relied on as a defect in title; it is now no cause of forfeiture, for s. 14 of the Conveyancing Act, 1881, applies. Moreover, in this case the freeholders accepted rent on October 24; they had full notice of the state of repair, and so waived the breach of covenant. In any case the production of the receipt bound the purchaser to assume that all the covenants had been duly performed and observed up to the date of completion: Conveyancing Act, 1881, s. 3, sub-s. 5; *Bull* v. *Hutchens* (5); *Lawrie* v. *Lees.* (6)

Vernon Smith, K.C., and *Spence*, for the purchaser. The question is what was the state of the title on September 21, 1901, when the purchaser first had notice of the breach of the covenant to repair. The requisitions were not fully answered until November 6, and therefore the time when the purchaser obtained notice of the defect of title caused by this breach was before the time at which he could safely have taken possession. The condition in the Conveyancing Act, s. 3, sub-s. 5, does not apply, for the purchaser is only bound to assume that the covenants have been performed, "unless the contrary appears." Here the contrary does appear. In *Bull* v. *Hutchens* (5) and *Lawrie* v. *Lees* (6) the contract made the production of the receipt for rent conclusive evidence that the covenants had been performed. There is no case under the Act or

(1) (1888) 37 Ch. D. 535.
(2) [1900] 1 Ch. 683.
(3) [1900] 2 Ch. 625.
(4) [1897] 1 Q. B. 74.
(5) (1863) 32 Beav. 615.
(6) (1881) 7 App. Cas. 19.

under a contract where the purchaser has been held bound unless the receipt was made conclusive evidence, and even where those words were present it has been held that the condition did not cover breaches after the date of the contract, and, if there was such a breach, the title would not be forced on the purchaser: *Howell* v. *Kightley*. (1) That case is on all fours with the present case.

The vendor was bound to make good this breach of covenant, because it was a defect of title. But he was also bound to pay the expense of complying with the order, because it was an outgoing incurred before the time at which the purchaser could have safely taken possession. *Tubbs* v. *Wynne* (2) is conclusive on that point.

Eve, K.C., in reply.

SWINFEN EADY J. The question raised by this summons, issued by the vendor under the Vendor and Purchaser Act, 1874, is, By whom are the costs of complying with this order to be borne—by the vendor or the purchaser?

It was not disputed that, in the absence of any stipulation on the subject, the vendor must bear all expenses and outgoings of property sold down to the time when a good title was first shewn, so that the purchaser could safely take possession, and as from that time all such expenses and outgoings must be borne by the purchaser. This was treated as settled law in *Barsht* v. *Tagg*. (3)

On November 6, 1901, the last outstanding requisition was cleared up. The governing date, shewing the dividing line by which the rights and liabilities of the parties are to be determined, is November 6, 1901.

It has been contended before me by the vendor that the costs of complying with the order of the Lambeth Police Court must be borne by the purchaser, and that the purchaser is bound to indemnify the vendor against the expense. This contention was based upon the fact that the fourteen days within which the work was ordered to be done did not begin to

(1) (1856) 21 Beav. 331. (2) [1897] 1 Q. B. 74.
(3) [1900] 1 Ch. 231, 234.

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run until after November 6, 1901, and therefore that the vendor was not in default; the expenses were incurred after November 6, 1901, and therefore must be borne by the purchaser. He insisted, moreover, that the expenses did not become a charge on the property until the completion of the work.

This argument does not touch the principle upon which, in my judgment, the present case falls to be decided. The sale is of a leasehold house, the lease containing a covenant to keep the buildings in good and substantial repair and condition. The sale is under an open contract, so that the purchaser is entitled to proof that the covenants and conditions in the lease have been performed and observed up to November 6, 1901. Under the Conveyancing Act, 1881, s. 3, sub-s. 4, upon production of the receipt for the last payment due for rent, the purchaser is to assume, unless the contrary appears, that all the covenants of the lease have been duly performed up to the actual completion. But in the present case the contrary does clearly appear. There is no dispute that on November 6, 1901, the covenant before mentioned had been broken, and that a portion of the building was so much out of repair as to be dangerous, and to justify the action taken by the London County Council. The vendor contended that, although the premises were out of repair, the purchaser had notice of their state and condition before entering into the contract. The result of the evidence is that the purchaser did inspect the premises before agreeing to purchase, and saw some cracks there; but that these afterwards increased to such an extent that the premises became in a dangerous condition by September 21, 1901, and remained so until after November 6, 1901. The knowledge of the purchaser of the state of the property at the date of the contract does not, however, appear to me to be material. It has been held that the obligation to make a good title to leaseholds is not removed by the knowledge of the purchaser, at the time of the sale, that the title was bad by reason of the breach of a covenant to repair: *Barnett* v. *Wheeler*. (1) The vendor then insisted that the purchaser

(1) (1841) 7 M. & W. 364.

could not object to the breaches of covenant, as the receipt for the ground rent had been produced, and he relied upon the cases of *Bull* v. *Hutchens* (1) and *Lawrie* v. *Lees* (2); but in both these cases the purchaser was bound by the conditions on the contract to accept the last receipt for rent as conclusive evidence that the covenants had been performed, whereas under the Conveyancing Act the receipt is only primâ facie evidence, and when the contrary appears the receipt cannot be relied upon. The result is that, as between the vendor and purchaser of this leasehold house, I decide that the expense of complying with the order of the Lambeth Police Court, in respect of which the vendor is clearly liable under the covenant in the lease, must be borne by the vendor, and cannot be thrown by him upon the purchaser.

I am satisfied, however, that the costs of the summons have been much increased by the purchaser's denying any knowledge of the cracks in the house at the date of the purchase, and it would not be right to throw these costs on the vendor. I order the purchaser's costs to be taxed, and the vendor to pay one-half of the amount.

Solicitors: *John Bartlett; J. E. Anthony.*

(1) 32 Beav. 615. (2) 7 App. Cas. 19.

J. R. B.

C. A.
1902
April 29;
May 1, 12.

In re MADDOCK.
LLEWELYN *v.* WASHINGTON.

[1901 M. 397.]

Administration of Assets—Order of Administration—Insufficient Personal Estate—Residuary Bequest—Trust dehors the Will of specified Part of Residue.

A testatrix devised her real estate and bequeathed the residue of her personal estate to A., who was one of the executors of the will, and by a subsequent written memorandum (not attested as a will) the testatrix expressed her wish that a specified part of the residue should go to third persons whom she named. The memorandum was communicated by the testatrix to A., and was assented to by her, and she admitted that it created a trust binding upon her. The residuary personal estate (other than that comprised in the memorandum) was insufficient for the payment of the debts of the testatrix:—

Held, that the memorandum must be treated as if its contents had been contained in the will or a codicil, so that for the purpose of administration the trust of the specified part of the residue stood in the same position as a specific bequest of that part:

Held, consequently, that the debts of the testatrix must be paid first out of that part of the residue which was not affected by the trust, and that then the deficiency must be borne rateably by the specified part of the residue and the real estate.

Decision of Kekewich J., [1901] 2 Ch. 372, reversed.

APPEAL from the decision of Kekewich J. (1)

Sarah Maddock, spinster, who died on December 14, 1898, by her will dated January 11, 1897, appointed the plaintiff and the defendants Susan Washington and J. F. Maddock trustees and executors thereof. And she devised all her real estate and bequeathed the residue of her personal estate to Susan Washington absolutely.

On January 17, 1897, the testatrix signed the following memorandum:—

"It is my request that Miss Hannah Barker, daughter of the late George Barker, should receive the interest arising from all the money I have saved after being invested by my trustees, and paid half-yearly to her. This I leave with my

(1) [1901] 2 Ch. 372.

will. And at her death to go to my nephew John Francis and his children."

The signature of the testatrix was attested by Susan Washington only.

The contents of this memorandum were communicated by the testatrix before her death to Susan Washington, who admitted that the memorandum created a valid trust binding on her in favour of the persons therein named.

By an order dated March 14, 1900, made upon a summons to determine the scope and effect of the memorandum, it was declared that all the property of the testatrix belonging to her at her death was bound by the memorandum, except a freehold house called "Brooklyn," which was her only real estate, a sum of 385*l.*, being the apportioned income to the date of her death arising from certain trust funds to the income of which she was entitled for her life, and her furniture, farming stock, and household goods and effects.

In the course of the administration of the estate it was found that the residuary personal estate (apart from the portion affected by the memorandum) was insufficient for the payment of the debts of the testatrix, the estate duty on her general personal estate, and the costs of administration, and the question arose out of what funds the deficiency ought to be borne and paid.

A summons was taken out to determine this question, and also a question relating to the payment of estate duty in respect of a sum of 18,000*l.* which the testatrix appointed by the will.

The second question was not raised upon the appeal.

Kekewich J. held that the debts, &c., were payable rateably out of that part of the residue which was affected by the memorandum and that part which was not affected by it.

The cestuis que trust under the memorandum appealed.

Renshaw, K.C., and *Vaughan Hawkins*, for the appellants. *Cullen* v. *Attorney-General for Ireland* (1) has no application to the present case; it was a decision upon the Irish Stamp Acts. The memorandum is binding on the conscience of Miss

(1) (1866) L. R. 1 H. L. 190, 198.

C. A. 1902 MADDOCK, *In re.* LLEWELYN *v.* WASHINGTON.

Washington, as indeed she admits that it is: *Drakeford* v. *Wilks* (1); *Chamberlain* v. *Agar*. (2)

[STIRLING L.J. referred to *In re Pitt Rivers* (3), in which was cited *McCormick* v. *Grogan*. (4)]

A contract between two persons may give rise to a trust in favour of a third person, and such a trust will be enforced by the Court: *Gandy* v. *Gandy*. (5) There is such a contract here, and the question is, what is the true meaning of the contract as regards the exoneration of the trust fund from the debts of the testatrix. The cases which relate to pecuniary legacies apply in principle to specific gifts: *Barrow* v. *Greenough* (6); *Irvine* v. *Sullivan*. (7) A "specific" gift has been defined as "a severed or distinguished part" of the testator's property: *Bothamley* v. *Sherson*. (8) The gift in the present case falls within that definition. Specific gifts take priority over pecuniary gifts in the administration of estates: *Tombs* v. *Roch*. (9) Specific gifts are the last in order in contributing to the debts of a testator, though inter se they contribute equally. A specific gift ought not to stand in a worse position than a pecuniary gift. As between Miss Washington, the residuary legatee, and the cestuis que trust of the specific fund, the liability to contribute to debts ought to be the same as if there had been a specific gift of the trust fund in the will. The fact that the trust arises dehors the will makes no difference: *Lady Langdale* v. *Briggs*. (10) Effect should be given to the trust in the same way as if it had been created by the will itself. As was said by Lord Cairns in *Jones* v. *Badley* (11), "the Court engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude." The general residue should be first applied to the payment of debts, and then, if necessary, recourse should be had to the specific fund, just as if it had been specifically given by the will: *Clifton* v. *Burt*. (12)

(1) (1747) 3 Atk. 539.
(2) (1813) 2 V. & B. 259, 262.
(3) [1902] 1 Ch. 403.
(4) (1869) L. R. 4 H. L. 82.
(5) (1885) 30 Ch. D. 57.
(6) (1796) 3 Ves. 152.
(7) (1869) L. R. 8 Eq. 673.
(8) (1875) L. R. 20 Eq. 304, 309.
(9) (1846) 2 Coll. 490, 500, 501.
(10) (1856) 8 D. M. & G. 391, 405, 434, 435.
(11) (1868) L. R. 3 Ch. 362, 364.
(12) (1720) 1 P. Wms. 678.

Warrington, K.C., and *T. H. Carson, K.C.*, for Susan Washington. It is admitted that, if the appellant is right in saying that the trust created by the memorandum ought to be treated in the same way as if there had been a specific bequest of the fund by the will, there can be no objection to the form of the order which is asked for. No doubt, if the words of the memorandum had been in the will, the gift would have been specific.

The question in each case of this kind is, What is the extent of the obligation which the Court will impose on the person to whom the testator has communicated his intention in making the bequest to him? It may be merely an obligation not to take any personal benefit; it does not follow that it extends to changing the liability of the fund to the payment of the testator's debts. The obligation rests not so much on contract as upon the principle that it would be fraudulent on the part of the person to whom the motive of the gift has been communicated to take the property without fulfilling the trust.

[COZENS-HARDY L.J. Does not the obligation arise from the acceptance of the trust?]

The acceptance of the gift with knowledge of the condition which the testator engrafts upon it amounts to a representation that the legatee will give effect to the condition.

[COZENS-HARDY L.J. Would not that be a contract?]

It could not be enforced at law, though it might in equity. But it makes very little difference which is the right view, or by which Court the obligation could be enforced.

There is no authority which directly supports the appellants' argument. In none of the cases which have been cited could there be any doubt what the testator's intention was. In the present case the gift is of the specific fund "after being invested by my trustees." The meaning is, "You shall not take from my trustees any part of that which I have saved." Nothing would come to the trustees until after the debts had been paid out of the residue. No preference is given to this part of the residuary estate. There is not a direction to invest all the residue and then hold this part for the specified persons. It is given only after being invested by the trustees.

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In all the cases cited there could be no doubt as to the intention of the testator. In *Drakeford* v. *Wilks* (1) the trust attached to the specific legacy, and the question did not really arise. In *McCormick* v. *Grogan* (2) it was held that there was no trust. In *Barrow* v. *Greenough* (3) the testator's meaning was clear. In *Irvine* v. *Sullivan* (4) the obligation imposed was to pay some sums of money out of the residue. The Court treated those sums as payable with interest, as if they had been legacies, but the right to interest was not really contested. *Cullen* v. *Attorney-General for Ireland* (5) shews that a gift created by way of trust dehors a will does not stand in the same position as a legacy with reference to legacy duty, because it is not a testamentary disposition. The fair construction of what this testatrix has said is this—"Miss Washington is to allow the persons I have named to take the fund subject to the discharge of all outside obligations." It does not impose on Miss Washington the obligation of herself discharging those outside obligations.

E. Ford, for the plaintiff.

Vaughan Hawkins, in reply, referred to Lewin on Trusts, 10th ed. pp. 62, 63, and the cases there collected.

The specific fund must no doubt contribute rateably with the devised real estate to the payment of debts, &c., but not until the other part of the residue has been exhausted.

Cur. adv. vult.

May 12. COLLINS M.R. read the following judgment:—The question is, how far the order in which the property comprised in a will is available for the payment of debts is affected by a trust imposed upon the residuary legatee in respect of a specific part of the residue in favour of specified persons by virtue of a collateral non-testamentary document signed by the testatrix.

[His Lordship stated the facts, and continued:—]

Kekewich J. has held that the debts, &c., were payable

(1) 3 Atk. 539.
(2) L. R. 4 H. L. 82.
(3) 3 Ves. 152.
(4) L. R. 8 Eq. 673.
(5) L. R. 1 H. L. 190.

rateably out of the portion of the residue affected by the memorandum and the portion not affected by it.

The learned judge has arrived at this conclusion on the ground that, as was said by Lord Westbury in *Cullen* v. *Attorney-General for Ireland* (1), the obligation imposed by the memorandum is entirely dehors the will, and that it can therefore have no operation except upon such part of the residuary personal estate as comes to the hands of the legatee after the estate has been administered and all liabilities discharged in the ordinary course, without any regard whatever being had to the existence of the obligation created by the memorandum. It is obvious that, if this view be right, the obligation imposed on the conscience of the legatee by the memorandum might not come into operation at all until the greater part, or even the whole, of the fund made specifically subject to it had been exhausted, and that the person bound thereby would nevertheless be entitled to insist upon a mode of administration which, for his own advantage, might defeat the purpose of the testator in imposing the obligation. This would be a somewhat startling conclusion for that Court to accept which long ago had found means notwithstanding statutory difficulties to reach the conscience of legatees and compel performance of trusts. Having taken so bold a step to compel justice to be done, it would be strange if it were compelled to admit its impotence to interfere until after its intervention had become futile, as it well might if the legatee were insolvent and dishonest. It seems that the precise point involved in this case has never been raised before, and the question is whether the principle on which the Court has intervened in similar cases to give effect to the intention of the testator is not large enough to cover it. The principle is well established, and is expounded in numerous cases, which were cited in argument, from *Drakeford* v. *Wilks* (2), decided by Lord Hardwicke, onwards; but it seems to be nowhere more clearly stated in recent times than by Lord Cairns in *Jones* v. *Badley* (3), where, adopting and enlarging the explanation given by

(1) L. R. 1 H. L. 190, 198. (2) 3 Atk. 539.
(3) L. R. 3 Ch. 363.

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Wood V.-C. in *Wallgrave* v. *Tebbs* (1), he said: "Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the Court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded, and for this reason: The devisee, by his conduct, has induced the testator to leave him the property, and, as the Lord Justice Turner says in *Russell* v. *Jackson* (2), no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will."

The obligation, therefore, has, it would seem, as between the legatee, who under such circumstances accepts the legacy, and the persons designated by the testator as beneficiaries, the character of a trust. But the right of the latter is wholly dependent on whether the legatee accepts the legacy with knowledge of the mandate, and no right for them arises at all unless and until the legatee has, with notice, accepted the legacy. A personal relation is then established between these two parties, without reference to others, and, as between them, would seem to have the incidents of a trust.

It is not denied that, had the memorandum been actually added in the form of a codicil to the will, its effect would have been that contended for by the appellants. The unappropriated residue of the personalty would have been applied first, and then the specific legatee under the codicil, and Miss Washington as the specific devisee of the house, would have contributed pro ratâ to the balance. The present case is free from the complication of any other legatee being concerned in the distribution. On what ground then must the Court hold its hand and refrain from insisting on equity being done? The fact that the memorandum creates an obligation dehors the will, and cannot

(1) (1855) 2 K. & J. 313. (2) (1852) 10 Hare, 204.

be enforced as part of the will, does not seem to me to be at all inconsistent with the right asserted by the Court, on the principle above stated, to intervene to prevent an unrighteous insistence upon a primâ facie legal right. The Court does not wait to give effect to an equity which displaces the Statute of Frauds until after the rights of the parties have been disposed of on the footing of the statute. So it seems to me to be wholly consistent with the admission that nothing dehors the will can be treated as part of the will that the Court should intervene to prevent a legatee from committing a fraud by insisting on his rights under the will to the prejudice of his cestui que trust. Why should the Court renounce its jurisdiction over the legatee to compel him to perform his trust because he is engaged in assisting at the distribution of assets under the will? He is not emancipated from its jurisdiction because he is engaged in that process, and the Court will not, I should hope, be deterred from exercising this collateral jurisdiction by the fear that in so doing it may indirectly give effect to the well-ascertained intention of a testator not expressed on the face of the will, but not inconsistent with it.

I think this appeal must be allowed, and that the contention of the appellants must prevail.

STIRLING L.J. There can be no question that, upon the principles stated by Lord Hatherley (when Wood V.-C.) in *Wallgrave* v. *Tebbs* (1) in a passage quoted with approval by Lord Cairns L.C. in *Jones* v. *Badley* (2), Miss Washington is in equity subject to a personal obligation to dispose of the property mentioned in the memorandum of January 17, 1897, in accordance with the directions therein contained. The precise nature and extent of the obligation must depend on the true meaning and effect of that document.

It was properly admitted at the bar that, if the memorandum had been duly executed and admitted to probate as a codicil to the will of the testatrix, such property (which I shall hereafter call the savings) would have been specifically bequeathed by the testatrix, and consequently been exempted from payment of

(1) 2 K. & J. 313, 321. (2) L. R. 3 Ch. 362.

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funeral and testamentary expenses, debts, and legacies, if the personal estate not specifically bequeathed was sufficient to pay these charges. The principle of the exemption is, as was pointed out by Lord Selborne L.C. in *Robertson* v. *Broadbent* (1), "that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and in statu quo, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts; but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable."

Inasmuch as the memorandum was not executed as a codicil, this reasoning cannot be applied without some qualification. If, for example, the testatrix had by her will made specific or pecuniary bequests, the legatees would have been entitled to say that their rights could not be affected by a document which did not satisfy the requirements of the Wills Act, and to insist that the estate should be administered (so far as they were concerned) without regard to it, and consequently the savings as well as the other property devised and bequeathed to Miss Washington would remain subject to those rights, as in any case all such property would be to the rights of creditors. But, as between Miss Washington and the beneficiaries under the memorandum, the savings have been separated in favour of those beneficiaries from the general mass of the testator's estate, and made subject to the disposition expressed in the memorandum. Primâ facie, therefore, it seems to me that, as between Miss Washington and those beneficiaries, the principle laid down by Lord Selborne applies, and that the savings ought

(1) (1883) 8 App. Cas. 812, 815.

(as between that property and the other property given to Miss Washington) to be held exempted from the charges which fall primarily on the personal estate not specifically bequeathed.

The memorandum itself when carefully examined seems to me to contain much which serves to indicate that this was the meaning of the testatrix. She states that she leaves the document "with her will": she desires the fund to be invested by her trustees. In my opinion, this indicates her meaning to be that the memorandum should (as between the beneficiaries thereunder and Miss Washington) be taken as forming part of her testamentary disposition, and that (as between the same parties) the memorandum should take effect as if it had been a duly executed codicil, and the like consequences as regards the administration of the estate must follow.

Kekewich J. has based his decision on the ground that the title of the beneficiaries under the memorandum was dehors the will. This is undoubtedly true, yet it does not seem to me to conclude the case. If Miss Washington had died before the estate of the testatrix was fully administered and had made a will bequeathing the savings in the terms of the memorandum, her legatees would have derived title dehors the will of the testatrix; but *Lady Langdale* v. *Briggs* (1) would have been, as I think, a direct authority in favour of the exemption of the savings from the funeral and testamentary expenses and debts of the testatrix. In that case a testator specifically bequeathed certain leaseholds, which formed part of the general personal estate of a prior testatrix whose estate was not completely administered at the death of the testator, and it was contended that the leaseholds were subject to the payment of the funeral and testamentary expenses, debts, and legacies of the testatrix. Turner L.J. said (2): "It was . . . . insisted that the whole or some part of the funeral and testamentary expenses, debts, and legacies . . . . ought to be made good out of these leasehold estates. But as to the funeral and testamentary expenses, debts, and legacies there were other assets . . . . out of which they could be, and were ultimately, paid. And surely if these leaseholds were well bequeathed by the will of the testator, it

(1) 8 D. M. & G. 391. (2) 8 D. M. & G. 434–5.

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was the duty of his executors to take care that they were not unnecessarily sold for the purpose of answering these payments." So here, it seems to me that Miss Washington came under an obligation to take care that (as between herself and the beneficiaries under the memorandum) the savings were not unnecessarily resorted to for the purpose of answering the funeral and testamentary expenses and debts of the testatrix.

Finally, I may observe that the view which I have taken does not conflict with any decision, and is in accordance with what was done by Lord Alvanley M.R. in *Barrow* v. *Greenough* (1) and by James V.-C. in *Irvine* v. *Sullivan*. (2) For these reasons I think that the appeal ought to be allowed.

COZENS-HARDY L.J. read a judgment, in which (after stating the facts) he continued:—It now appears that the residuary personal estate, exclusive of that portion which is subject to the memorandum, is not sufficient to provide for the payment of funeral and testamentary expenses and debts and the costs of administration, and the question arises how the deficiency ought to be borne. Kekewich J. held that the debts, &c., are payable rateably out of that portion of the residuary personal estate which is bound by the memorandum and that portion which is not so bound, and this is an appeal by persons interested under the memorandum against that declaration.

It is necessary to consider upon what principle the undoubted rule of the Court, that effect is to be given under certain circumstances to declarations in writing not properly attested, is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee, who is entitled absolutely upon the terms of the will, is in no way affected by the existence of a document shewing that he was not intended to enjoy beneficially, if he had no knowledge of the document until after the death of the testator. Such a memorandum may or may not influence him as a man of honour, but no legal effect can be given to it. If, however, the devisee or legatee is informed of the testator's intention, either before the

(1) 3 Ves. 152. (2) L. R. 8 Eq. 673.

will in his favour is made or at any time afterwards before the testator's death, different considerations arise. It is sometimes said that under such circumstances a trust is created in favour of the beneficiaries under the memorandum. At other times it has been said that the devisee or legatee under the will is bound by contract, express or implied, to give effect to the testator's wishes. Now, the so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next of kin or residuary devisee or legatee. The case of *Tee* v. *Ferris* (1) is instructive on this point. There a testator by his will gave his residue to Ferris and three other persons, as tenants in common. By a memorandum of even date, not attested as a codicil, he expressed his confidence that the four persons would appropriate the residue "to charity objects." Ferris alone was informed of this in the testator's lifetime, and Wood V.-C. held that Ferris' one-fourth was affected by the memorandum, but that the other three-fourths were not so affected. Wood V.-C. said (2): "It is well-settled law, that, if the testator had read over to Ferris his will, and also the letter of August 18, 1846, and said, 'Mr. Ferris, I have made that will, and written that letter expressing my intentions in making it,' and Ferris had said nothing in reply, he would, in this Court, have been taken to have contracted to carry those intentions into effect." The Vice-Chancellor then held that, although Ferris did not know of the memorandum for sixteen months and learnt its existence and contents only on the day of the testator's death, he could be in no better position, and added (3): "That being so, it is impossible to contend that a beneficiary, placed in such a position, is at liberty to stand by, and say nothing; and, having so stood by and said nothing, is then to be at liberty, after the testator's death, to turn round and claim the benefit given him on the face of the will, as if it had been given to him absolutely." In

(1) (1856) 2 K. & J. 357. (2) 2 K. & J. 363.
(3) 2 K. & J. 364.

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other words, a person to whom the testator's wishes are thus indicated is held, in effect, to contract that, in consideration of the testator giving him the property absolutely, or, if already given to him absolutely, not revoking the gift, he (the legatee) will give effect to the testator's wishes, to the same extent and in the same manner as if those wishes had been formally expressed in a testamentary document admitted to probate. In *Tee* v. *Ferris* (1) the declaration in the decree was that the one-fourth share given to Ferris was "affected by the trusts declared thereof by the letter, so far as such trusts are valid." And the decree went on to declare that, so far as the real estate and impure personal estate were concerned, the trusts were invalid, and that the heir-at-law and next of kin were respectively entitled thereto. The obligation imposed upon Ferris was to treat his one-fourth exactly as if it had been in terms given by will or codicil for the charitable purposes mentioned in the letter, the result being that the heir-at-law and next of kin, who certainly were not intended to benefit, did in fact benefit. There is thus created what Lord Cairns in *Jones* v. *Badley* (2), adopting the language of Wood V.-C., calls "in effect a case of trust," and says that the Court will not allow the devisee or legatee to set up the Wills Act.

Another way of arriving at the same conclusion is to say that the devisee or legatee is estopped by his conduct from denying that the memorandum is a part of the will.

But, whether the true principle be trust, or contract, or estoppel, it seems to me that, as between the devisee or legatee and the persons interested under the memorandum, all the same consequences must follow as would follow if the memorandum had in fact formed part of the will.

Applying these principles to the present case, Miss Washington, who attested the memorandum, must be taken to be subject to a personal obligation to give effect to it, precisely as if it had been duly executed as a codicil and admitted to probate.

It was faintly argued that the memorandum, if admitted to probate, would not have amounted to a specific bequest; but,

(1) 2 K. & J. 357. (2) L. R. 3 Ch. 362, 364.

upon the language of the memorandum, I can feel no doubt on this point. The result is that Miss Washington, in dealing with the residuary real and personal estate given to her by the will, must treat the property comprised in the memorandum as though it had been specifically bequeathed, and it follows from this that the residuary personal estate not comprised in the memorandum must first be exhausted in the payment of debts, &c., and that any deficiency must be borne rateably by the property comprised in the memorandum and by the real estate devised to Miss Washington.

Kekewich J. seems to have considered that the memorandum only operated as a gift of a portion of the residuary estate after the entire residue had been properly administered. But, for the reasons I have stated, I think this view is not correct. As against creditors, of course, this property is available. If there were any specific legatees or devisees other than Miss Washington, this property must be exhausted before the properties bequeathed or devised to them could be touched. But, as against Miss Washington, this property must be regarded as specifically bequeathed.

The result is that the appeal must be allowed.

Solicitors: *Ridsdale & Son, for Heaton & Son, Burslem; Hicklin, Washington & Pasmore.*

W. L. C.

Dicta of STIRLING, L.J., at p. 239, *applied. Re* WILLIAMS' WILL TRUSTS. [1949] 2 All E.R. 11.

C. A.
1902
April 15.

SCHNADHORST.
SANDKUHL *v.* SCHNADHORST.

[1900 S. 4428.]

Will—Construction—Gift to a Class—Gift over on Death coupled with a Contingency—"Die leaving Issue"—Death at any Time—Divesting—Defeasibility, Period of.

A testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income for the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter should attain that age or marry. Subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common:—

Held, affirming Joyce J., [1901] 2 Ch. 338, that children who survived the testator only took vested indefeasible interests if and when they should die—that is, die at any time—without leaving issue.

APPEAL from Joyce J. (1)

Younger, K.C., and *A. F. Peterson*, for the appellant, the plaintiff, Mrs. Sandkuhl, a married daughter of the testator, who had attained twenty-one.

Micklem, K.C., and *W. H. Cozens-Hardy*, for the defendant, Ernest Edward Schnadhorst, a son of the testator, who had also attained twenty-one, and was the testator's legal personal representative.

Dibdin, K.C., and *R. J. Parker*, for the defendants, the infant children of E. E. Schnadhorst, were not called upon.

The arguments on behalf of Mrs. Sandkuhl and E. E. Schnadhorst were substantially the same as were urged in the Court below.

The following cases were cited: *O'Mahoney* v. *Burdett* (2);

(1) [1901] 2 Ch. 338. (2) (1874) L. R. 7 H. L. 388.

Home v. *Pillans* (1); *Monteith* v. *Nicholson* (2); *Bowers* v. *Bowers*. (3)

COLLINS M.R. This case has been argued by Mr. Younger with his usual care, and if there were no authority on the point I am not sure that I might not have been disposed to hold that his view of the testator's intention was the correct one. We cannot, however, indulge in speculation, but must see what, upon the construction of the will and of the language he has used, the testator must be taken to have intended.

I think the question arising on this will is covered by authority, even if, apart from authority, one were inclined to yield to a contrary view. The point we have to decide is stated very clearly and shortly in the summons. [His Lordship read the summons, and continued:—] The testator's gift to his children runs as follows: [His Lordship read the gift quoted in the report below, and continued:—] Then comes the clause which creates so much difficulty: "I direct that if any of my children shall die leaving issue such issue shall take his or her deceased parent's share equally as tenants in common."

Mr. Younger has presented to us four possible constructions of this clause: the fourth he rejects, but the first three he was more or less insistent in pressing upon us. The first was that "die" means die under twenty-one; and that if a child does not die under twenty-one, the gift becomes indefeasibly vested at twenty-one. The second was that the period to which the contingency of death leaving issue must be referred is during the lifetime of the widow, that is to say, the gift must vest on the death of the widow. The third was that for the divesting clause to take effect death must take place before the youngest child attains twenty-one. And the fourth was that "death" means death at any time. That fourth construction is the one Mr. Younger rejects. In support of the first contention—that the period to which the contingency of death leaving issue is to be referred so as to enable the gift over to

(1) (1833) 2 My. & K. 15; 39 R. R. 116.

(2) (1838) 2 Keen, 719; 44 R. R. 329.

(3) (1870) L. R. 5 Ch. 244.

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take effect is before attaining twenty-one—he relied on *Home* v. *Pillans* (1); but he is met with this difficulty, that in *Home* v. *Pillans* (1) there was a gift to two ladies when and if they should attain twenty-one: in this case it is not so. So far as the daughters are concerned, the gift is not to them if they shall attain twenty-one, but if they shall attain that age or marry: therefore he is not able to rely upon *Home* v. *Pillans* (1) so far as the daughters are concerned; but he says the case may and ought to apply to the sons. Where, however, the testator puts sons and daughters into one class, as he does in the present case, with a similar direction as to all of them dying and leaving issue, I do not think we can apply one rule to daughters and a different rule to sons. With regard to the case of *Home* v. *Pillans* (1), it is sufficient to quote what Lord Cairns said about it in *O'Mahoney* v. *Burdett*. (2) He says: "The case of *Home* v. *Pillans* (1) was a case of an entirely different kind. There was there a bequest to the testator's nieces when and if they should attain twenty-one; and, in case of the death of either niece leaving children, or a child, the testator gave the share of the niece so dying to her children or child. This was not the case of an absolute gift, with a gift over in a certain event. There was no gift over, and there was no gift at all until a niece attained twenty-one, and the child of a niece marrying and dying before twenty-one would have been wholly unprovided for if the Court had not held that the words 'in case of the death of my said nieces or either of them, leaving children or a child,' pointed to a death under twenty-one."

That seems enough to dispose of the argument on *Home* v. *Pillans* (1), so far as regards the first contention, which Mr. Younger did not really press upon us. He confined himself mainly to the second and third alternative contentions—that is to say, that death leaving issue must take place in the lifetime of the widow, or at all events before the youngest child attained twenty-one.

It was suggested that *Home* v. *Pillans* (1) is an authority that this is a case of alternative gifts, not of an absolute gift followed by a defeasance. That is really disposed of by the

(1) 2 My. & K. 15; 39 R. R. 116. (2) L. R. 7 H. L. 388, 397.

passage I have read from the speech of Lord Cairns. That case does not apply where the gift is to daughters at twenty-one or marriage, because, if the daughter marries before twenty-one, the other alternative is excluded and the defeasance applies equally in either case. It seems to me that in this will there is an absolute gift to children who, if sons, attain twenty-one, or, if daughters, marry; and then there is a provision that, if one of them dies leaving issue, his or her interest goes over to that issue, and that interest cannot be ascertained until that individual dies. The point was, I think, decided by the House of Lords in *O'Mahoney* v. *Burdett* (1), and is thus expressed in the head-note: "A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary. A gift to X. for life, with remainder to A., and if A. dies unmarried or without children to B., is an executory gift over, which will defeat the absolute interest of A. in the event of A. dying, at any time, unmarried or without children." It was there held that the words of the will in that case, "die unmarried or without children," must bear their ordinary and literal meaning—that is, death unmarried or without children at any time; and that this ordinary and literal meaning could not be departed from unless there were a context (which there was not) rendering a different meaning necessary or proper. Now, that seems to be a clear authority that "death" in the will in the present case primâ facie means death at any time. True, the will says that the contingency on which the defeasance is to take effect is, if any child should die leaving issue, not if any child should die without leaving children; but the precise character of the contingency can make no difference provided it cannot be ascertained till death. If, therefore, we have to construe this clause on authority, we must hold that, unless there is some context to limit the meaning of the word, "death" means death at any time, and not merely death within the life of the

(1) L. R. 7 H. L. 388.

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widow or at any time less than the whole life of the legatee. Now, that being the rule, what context is there here to lead us to a different conclusion upon the meaning of the word? Mr. Younger, with his usual ingenuity, has pressed some points which only seem to shew that the testator meant the children to take at some time or other; but there is nothing to shew an intention on the part of the testator as to the actual date of distribution.

Upon that I ought to refer to the passage in the speech of Lord Hatherley in *O'Mahoney* v. *Burdett* (1), where he says: "So again, I apprehend, in another class of cases, many of which were cited before us, which have been decided since *Edwards* v. *Edwards* (2), one of them having been before myself; in those cases where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives,' holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who, having it in their hands, will of course spend it without any further trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise." Mr. Younger says that those observations apply to the present case, for the words "to whom I give and bequeath my residuary real and personal estate in equal shares" fix the period of distribution at twenty-one or marriage; but, in my opinion, so to hold would be to strain the language of

(1) L. R. 7 H. L. 388, 403. (2) (1852) 15 Beav. 357.

the will beyond its natural meaning. In my opinion, therefore, one gets no context out of this will which narrows or defines the period within which the gift over is to take effect as anything short of the death of the person on whose death the event happens, that is, the gift over is to take effect. I think the learned judge was right in deciding as he did, and the appeal must be dismissed.

STIRLING L.J. I am of the same opinion.

I agree with what was said by Joyce J., and should be content to stop there; but, out of respect to the very earnest argument that has been addressed to us, I will state my view of the case.

Mr. Younger has satisfied me abundantly that the testator has, according to the construction of this will put upon it by Joyce J., made a distribution of his property which is very inconvenient to his children, and if his attention had been drawn to it probably he would not have framed his will in its present form; but that does not allow the Court to depart from the language he has used. The Court cannot alter the language of the will, and in construing it that language must have its natural and proper meaning given to it, unless there is something in the context to alter it. Mr. Younger has not satisfied us that another meaning ought to be given to the language of this will.

Now, the question is, What is the meaning of the gift over if any of the testator's children should die leaving issue? Adopting the words of Lord Cairns in *O'Mahoney* v. *Burdett* (1), I say that the gift over should be read according to its natural and proper meaning—that is, as meaning death at any time; and that this original and literal meaning ought not to be departed from unless the context renders it necessary or proper to do so. That being so, we have to see what sort of context would render that necessary or proper. In *O'Mahoney* v. *Burdett* (1) Lord Selborne pointed out two classes of cases in which such a context is found: one is where there is an express direction that the distribution is to take place at a particular time; and

(1) L. R. 7 H. L. 388, 398.

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the other class of cases is where there is an indication on the face of the will that the legatee is to take in a certain event an absolute interest. Now, do we find such an indication in the present will? What is relied on for this purpose is that the testator, after giving his widow an interest during her life or until her second marriage, proceeds thus: [His Lordship then read the clause beginning "And subject to the provision aforesaid," and ending "in equal shares," and continued:—]

There are two points that have been relied upon in argument. In the first place, it is said that the direction for the application of the income lasts only until the youngest child attains twenty-one, and that when that child attains twenty-one, there being no direction as to the application of the income after that, the trustees are to pay the trust fund to the children who have become entitled. The other contention is that the words "to whom I give and bequeath my residuary real and personal estate in equal shares" give the children an absolute interest. I cannot see in either of these circumstances any expression or indication of the testator's meaning that after the death of the widow and on the youngest child attaining twenty-one there is to be a distribution. The testator does not say so in express terms: so far as the language goes it has a contrary meaning. The fund is not to pass away from the hands of the trustees, but to continue to be held by them. The testator has given his trustees a direction to pay the whole income for the maintenance of the children until the youngest attains twenty-one, or being a daughter marries. When the youngest child attains twenty-one, then that trust comes to an end. But there is no express direction for payment or distribution, and the income will follow the ordinary course of law, namely, that a child who takes a vested interest liable to be divested in a certain event takes the benefit of the income until the event occurs. I cannot attribute any further meaning to the words "to whom I give and bequeath my residuary real and personal estate in equal shares." They do not amount to a direction to divide the property at any particular period: still less do they amount to an indication of intention on the part of the testator that in

any particular event the objects of his bounty were to take absolute interests.

The nature of the cases which are referred to by Lord Selborne may be illustrated by the example he gives in *O'Mahoney* v. *Burdett* (1), namely, *Da Costa* v. *Keir* (2), where the will was, upon the context, held to express the testator's intention that in the event of the legatee surviving the widow, the tenant for life, she, the legatee, was to have an absolute power of disposition over the property.

In my opinion, the present case does not fall within either of the two classes of cases Lord Selborne mentions; but those two classes are not exhaustive: there may be others. In every case there may be a question what the context is, and the Court has to give effect to the language of the will.

Then the only other contention is this. It is said that the language closely resembles that used by the testator in *Home* v. *Pillans*. (3) It seems to me that the reasoning based on that case is not well founded. In *O'Mahoney* v. *Burdett* (1) Lord Cairns appears to have treated *Home* v. *Pillans* (3) as a case of alternative gifts, and not as a case of an absolute gift followed by a gift over. In my opinion, if that is the foundation of the decision in *Home* v. *Pillans* (3), that case does not apply to the present.

Giving the ordinary meaning to the language used by this testator, it appears to me that he contemplated that all his children would take vested interests, if sons, at twenty-one, and if daughters, at twenty-one or marriage. It was pointed out that at the date of the will a daughter had attained twenty-one, and the testator must have contemplated that she might survive him, and the language of the clause as to children dying leaving issue applies to any of his children—daughters as well as sons—and therefore must apply to this daughter. Therefore, the testator, according to the language he has used, must have contemplated that upon his death this particular daughter would take a vested interest; and, that being so, I do not think that the clause as to death leaving issue can, as

(1) L. R. 7 H. L. 388. (2) (1827) 3 Russ. 360; 27 R. R. 93.
(3) 2 My. & K. 15; 39 R. R. 116.

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regards her, be limited to death before taking a vested interest; and, if that is so as regards her, it must be treated in the same way as regards all the children. I think I should have arrived at the same conclusion if all the children had been under twenty-one at the date of the will.

COZENS-HARDY L.J. I agree. I cannot discover in this will any context which requires any other meaning to be put upon the clause in question than that which the House of Lords has held, in *O'Mahoney* v. *Burdett* (1), to be the meaning of clauses of this kind.

Solicitors: *Swann, Green & Co.; Flux, Leadbitter & Neighbour.*

G. I. F. C.

C. A. 1902 BYRNE J. *March* 11, 15, 19. C. A. *April* 23, 24; *May* 7.

In re KINGDON & WILSON.

[1901 K. 265.]

Practice—Solicitor and Client—Costs—Taxation—"Disbursement"—Estate Duty, including in Bill—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-ss.* 1, 2; *s.* 8, *sub-s.* 16; *s.* 22, *sub-s.* 1 (*d*)—*Application by Third Parties—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38, 39.

A payment for estate duty made by a solicitor on behalf of his client ought not to be included in his bill of costs as a "disbursement" within the meaning of s. 37 of the Solicitors Act, 1843.

Decision of Byrne J. reversed.

In re Lamb, (1889) 23 Q. B. D. 5, overruled.

Per Byrne J.: There is no general rule that the costs of applications for taxation under ss. 38 and 39 of the Solicitors Act, 1843, must in all cases follow the result of the taxation.

MRS. ROSS, by her will dated September 15, 1898, appointed Benjamin West and Charles Judge executors and trustees, and, after giving certain legacies, bequeathed the residue of her estate to her trustees upon trust for Thomas Kelk Ross absolutely. The testatrix died on January 25, 1899, and on March 2 following her will was duly proved by her executors. T. K. Ross died on July 13, 1900, having by his will appointed

(1) L. R. 7 H. L. 388.

his widow Annie Ross, R. B. Dods, and T. C. Parkin his executors and trustees, by whom the will was duly proved on September 18, 1900.

Messrs. West and Judge, as executors of their testatrix Mrs. Ross, employed Messrs. Kingdon & Wilson as their solicitors in proving her will and administering her estate.

As Mrs. Ross died subsequently to the passing of the Finance Act, 1894 (57 & 58 Vict. c. 30), estate duty, and not probate duty, became payable, and the proceedings necessary to obtain probate were regulated by that Act.

On February 1, 1899, Mrs. Ross's executors drew a cheque on their banking account for 130*l.* in favour of their solicitors, Messrs. Kingdon & Wilson, to meet the estate duty payable, and generally on account of their indebtedness. The amount of the estate duty was 117*l.* 4*s.* 4*d.*, and was paid by the solicitors on February 17, 1899.

On January 10, 1901, the solicitors rendered to the executors and trustees of the will of T. K. Ross, the residuary legatee under Mrs. Ross's will, their bill of costs in relation to the probate and administration of her estate. In the bill the general professional charges were first entered, amounting to 101*l.* 1*s.* 5*d.* At the foot of this amount was added as a disbursement the estate duty, thus: "Paid probate duty, 117*l.* 4*s.* 4*d.*," making the amount of the total bill 218*l.* 5*s.* 9*d.* From this was deducted the 130*l.* paid on account, the bill leaving a balance as due to the solicitors of 88*l.* 5*s.* 9*d.*

The clients, being dissatisfied with several of the items charged in the bill, on May 2, 1901, obtained, on an application by originating summons, the common order for taxation, the costs of the application being reserved. Upon the bill being carried in for taxation, the question arose whether the solicitors were entitled to add to the bill the 117*l.* 4*s.* 4*d.* paid for estate duty, or whether that sum should be dealt with as an item in the separate cash account. The taxing master considered the latter course to be the correct one, and accordingly in taxing the bill excluded the 117*l.* 4*s.* 4*d.* Then from the 101*l.* 1*s.* 5*d.*, the amount of the bill proper, he taxed off 24*l.* 17*s.* 10*d.*, being more than one-sixth of such bill, which

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was therefore reduced to 76*l.* 3*s.* 7*d.*, and by his certificate, dated December 13, 1901, he settled the bill at that sum. The solicitors, being thus liable for the costs of the taxation, carried in an objection against the exclusion from the bill of the 117*l.* 4*s.* 4*d.* on the ground that it was a disbursement, and had been properly paid by them in the ordinary course of their duty. The taxing master overruled the objection, and in his written answer to it, after pointing out that estate duty and not probate duty was payable on Mrs. Ross's estate, and that the duty had been provided by her executors, said that the leading case, and one in which the matter had been thoroughly considered, was *In re Remnant* (1), where the principle was laid down that the only payments a solicitor could enter in his bill of costs as professional disbursements were payments made in pursuance of his professional duty, or such as were sanctioned as professional payments by the general and established custom and practice of the profession, and that other disbursements ought to be included in a separate cash account; that the taxing masters in their report to the Court in that case stated the payments which the solicitor in the discharge of his duty was bound to make, probate duty not being one of them. The taxing master went on to submit that the decision in *In re Lamb* (2)—that a payment by a solicitor of probate duty was a disbursement made by him in his professional character, and therefore properly chargeable in his bill of costs—went beyond the considered judgment in *In re Remnant* (1); that, probate duty being no longer payable, the decision in *In re Lamb* (2) should not be applied to the payment of estate duty, which was far heavier than probate duty; and that if, in dealing with estate duty, that decision should be followed, then, in the result, the solicitor, whatever might be the amount, would be entitled to enter as a payment in his bill of costs the amount paid for estate duty, whether paid out of the client's pocket or that of the solicitor, which in a considerable number of cases might render the solicitor's bill of costs untaxable except at the expense of the client.

On December 21, 1901, the solicitors took out a summons to

(1) (1849) 11 Beav. 603. (2) 23 Q. B. D. 5.

review the taxation, and then, on December 23, 1901, Mrs. Ross's executors took out a summons asking that the solicitors might be ordered to repay to them the 24*l.* 17*s.* 10*d.* taxed off the bill, and also the costs of that application; but the first part of the summons was ultimately dropped, the solicitors having repaid the 24*l.* 17*s.* 10*d.* to the executors.

The two summonses were set down together and adjourned into Court for hearing. The solicitors' summons to review was argued first. The summonses came on for hearing before Byrne J. on March 11, 1902.

G. I. F. C.

Norton, K.C., and *A. Poley*, for the solicitors. The taxing master was wrong in striking out the item for estate duty. The question is simply whether it is the custom of solicitors to insert in bills of costs sums paid for probate and estate duty as disbursements, and whether it has been the practice of the Court to allow such entries. The question whether or not the client provided the money for, or had any discretion about, making these payments is immaterial. Under the old law legacy and probate duty were held to be properly included in a bill of costs: *In re Bedson.* (1) The master has relied on *In re Remnant* (2); but in that case the Master of the Rolls said that the question depended on whether the payment had been made in pursuance of the professional duty undertaken by the solicitor which he was bound to perform; he said nothing about probate duty; and he allowed a charge of 28*l.* 18*s.* which had been paid to the proctors for the expenses of proving the will. In *In re Haigh* (3), which the master also refers to, it was a charge for legacy duty which was struck out, on the ground that such disbursements were generally made in the character of agents rather than solicitors. Even if the money has been specially found for the purpose by the client, the solicitor can insert in his bill payments for counsel's fees and for stamps. It is not necessary that the solicitor should have found the money himself if he was bound to make the payments: *In re*

(1) (1845) 9 Beav. 5. (2) 11 Beav. 603.
(3) (1849) 12 Beav. 307.

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Metcalfe (1); Poley on Solicitors, p. 434. The most recent authority on the subject is *In re Lamb* (2), which is a clear decision in our favour that probate duty ought to be inserted in the bill as a disbursement, on the ground that the solicitor is employed to obtain probate and must make the payment in the ordinary course of his duty; and the Court also held that whether a particular payment was a disbursement or not could not depend on its mere amount. The cases of *In re Seal* (3) and *Devereux* v. *White & Co.* (4) are illustrations of the same principle.

There is no difference for this purpose between probate duty and estate duty. The solicitor is bound to pay estate duty on all the personal estate if he continues to act as solicitor. That his making the payment and inserting it in his bill may make that bill untaxable is immaterial; it is a question of principle. It is immaterial that probate duty was a charge on the estate and estate duty is not. When *In re Remnant* (5) was decided probate duty was always in the Probate Court considered a disbursement. All fees were paid before probate by the proctors then and until the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). The amount was fixed by the Stamp Act, 1815 (55 Geo. 3, c. 184). Estate duty is established by s. 6, sub-s. 2, of the Finance Act, 1894 (57 & 58 Vict. c. 30), under which probate duty is now represented by that part of the duty which the sub-section says that the executor "shall" pay.

Levett, K.C., and *Hon. T. H. Watson*, for the executors of T. K. Ross. The taxing master was right. This case is governed by *In re Remnant* (5), which is always taken as a guide on these questions: Seton's Judgments and Orders, 6th ed. p. 280, and the test is whether or not the solicitors were bound to make this payment. It is absurd to say that a solicitor is under an obligation personally to pay estate duty on, for instance, the estate of a millionaire, and there is no evidence of any such custom. There is a great difference between estate duty and probate duty. Probate duty was paid by pur-

(1) (1862) 30 Beav. 406.
(2) 23 Q. B. D. 5.
(3) (1893) 37 Sol. J. 685, 842.
(4) (1896) 13 Times L. R. 52.
(5) 11 Beav. 603.

chasing and affixing a stamp which had to be paid for in cash. Stamps are practically not used for estate duty, and it is only necessary to send a cheque for the amount. Probate duty was payable under the Probate Duty Act, 1860 (23 & 24 Vict. c. 15), ss. 4, 5, and is a charge on the property. Under s. 6, sub-s. 2, of the Finance Act, 1894, estate duty is a debt, and it is not the duty of a solicitor to pay the debts of his client: Hanson's Death Duties, 4th ed. pp. 138, 272. *In re Lamb* (1) refers only to probate duty, and there is nothing in it which conflicts with the rule laid down in *In re Remnant.* (2) Estate duty is on a much higher scale than probate duty, and it cannot be necessary that the solicitor should pay it, nor customary that he should put it in his bill. The result would be absurd. For instance, if the duty were 6000*l.*, and the bill amounted to 1000*l.*, it would be impossible to tax off one-sixth.

We submit that the decision in *In re Lamb* (1) is wrong. The judges in the Divisional Court did not appreciate the rule in *In re Remnant* (2) that the test was whether there was a binding practice or custom on the subject. Even if *In re Lamb* (1) is sound, the rule should not be extended from probate duty to estate duty. According to the plaintiff's contention, the solicitors might even pay all the estate duty on the real estate and charge it as a disbursement, although the executors are not bound to pay it.

Norton, K.C., in reply. It may be that the duty on real estate would not satisfy the test. The solicitor could have obtained probate without paying that duty. Stamps are not used now, because duty is payable on every fraction; but that does not affect this question. The solicitor who did not pay the duty would be liable to an action for negligence. It does not matter whether his client has given him money for the purpose or not; but he is only bound to act as solicitor so long as he is supplied with money.

Cur. adv. vult.

March 15. BYRNE J. This is a summons to review taxation. The point raised on it is a very short one, and is as

(1) 23 Q. B. D. 5. (2) 11 Beav. 603.

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follows: Whether or not a solicitor is entitled to introduce into his bill of costs the sum of 117*l.* paid by him on behalf of the clients in respect of estate duty. The solicitor was at the time of such payment in funds from the clients, and on the authorities that makes no difference. I have had the advantage of reading the very careful answers to the objections by the taxing master in which he mentions the cases that are upon the books, and finally he suggests that, "Probate duty being no longer payable, the decision in *In re Lamb* (1)" (which I will mention presently, to which he refers) "should not be applied to the payment of estate duty, which is levied and paid on all property real or personal, settled or not settled, and is a far heavier duty than probate duty as originally assessed on personalty only. If in dealing with estate duty *In re Lamb* (1) be followed, then in the result the solicitor, whatever may be the amount, will be entitled to enter as a payment in his bill of costs the amount paid for estate duty, whether the same be paid out of the client's pocket or out of the solicitor's, and in a considerable number of cases may render the solicitor's bill of costs untaxable except at the expense of the client."

It appears to me that I am bound by authority in this matter. The case of *In re Lamb* (1) came before Lord Justice (then Mr. Justice) Mathew, and afterwards before the Divisional Court, composed of Pollock B. and Manisty J., and in that case there was a payment made for probate duty by a solicitor on behalf of his client. That was held to be a disbursement within the meaning of s. 37 of the Solicitors Act, and was properly included in the bill of costs. Pollock B. says in the course of his judgment: "There is a well-known practice of the profession as to solicitors' disbursements, which is laid down by the taxing masters in the case of *In re Remnant.* (2) In the case of *In re Haigh* (3) it was held that a payment of legacy duty by a solicitor was not a disbursement by him in his character of a solicitor, and could not be properly included in his bill of costs, but it is to be noted that in his judgment the then Master of the Rolls expressly used the word 'agent,'

(1) 23 Q. B. D. 5, 6, 7. (2) 11 Beav. 603.
(3) 12 Beav. 307.

and based his judgment upon the payment having been made by him in that character and not as a solicitor. Then there is a question of the distinction between probate and legacy duty, and as to this we are satisfied that the payment of probate duty is analogous to the payment of any other tax upon the subject which must be paid by the solicitor before the client can be in a position to exercise the rights to the exercise of which such payment is a condition precedent. We think that the decision of the learned judge was right; he has drawn the line where it has been drawn for many years by the profession and by judicial decisions." Manisty J. in the course of his judgment says: "I agree in thinking that this was a disbursement made by the solicitor in the ordinary course of his duty. The case of legacy duty is different; there is no reason why he should pay it, and he would not pay it unless he had a special authorization to pay legacies. But he is employed to obtain probate as he is employed to obtain a conveyance of property, and he must pay the probate duty in the one case just as he must pay the stamp duty in the other. And our decision is fortified by the report of the probate registrar, who says that it is the invariable practice to include sums paid for probate duty in bills of costs as disbursements." I need not again refer to the cases of *In re Remnant* (1) and *In re Haigh* (2), as the decision of *In re Lamb* (3) appears to me to cover the present case and to be a decision which I ought to follow, unless the suggestion of the taxing master to the effect that estate duty stands on a different footing from probate duty makes the distinction, and therefore involves that a solicitor should bring it into his cash account instead of into his bill of costs. Now, is there any fair difference between the estate duty payable in order to obtain probate and the old probate duty? By s. 6, sub-s. 2, of the Act 57 & 58 Vict. c. 30, it is provided: "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit." Then it

(1) 11 Beav. 603. (2) 12 Beav. 307.
(3) 23 Q. B. D. 5.

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goes on to say what he may pay: "and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the person accountable for the duty in respect thereof request him to make such payment." The payment which the executor of the deceased "must make," it appears to me, is a stamp duty (s. 6, sub-s. 1) collected in respect of that property on which duty must be paid before probate is granted. Following the reasoning of Manisty J. in the case to which I have already referred, it appears to me that the payment which is necessary to obtain probate falls exactly within the analogy of the old probate duty; and if there is to be any alteration in the practice which has been, according to Manisty J., the practice of the profession and the subject of decision for many years, it must be by a higher Court than this, or by a change in the rules respecting taxation by the proper authority.

Levett, K.C., on the second summons, asked for the costs of that summons and the reserved costs of the application for taxation.

Norton, K.C. The result of the decision on the first summons is that less than one-sixth has been taxed off the bill, and the clients have to pay the costs of the taxation. If the order to tax had been an order of course made at the instance of the clients, the costs of the order would have followed the result of the taxation. That is the invariable rule. This order was made under ss. 38 and 39 of the Solicitors Act, 1843, on an application by the representatives of the cestuis que trust of the clients and the costs were reserved; but the same rule applies. If the solicitor resists taxation and an order of course is made, and anything, however small, is taxed off the bill, the solicitor has to pay the costs of the application for taxation, but not otherwise; and in this case we did not resist.

Levett, K.C., in reply. There is no general rule as to applications under ss. 38 and 39, and, even if there is, the reservation of the costs shews that the rule was not intended

to apply. We were obliged to take out the summons in order to recover the 24*l.* 17*s.* 10*d.* which had been overpaid to the solicitors; so the costs of that summons ought to be paid by them.

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BYRNE J. Primâ facie I think the costs of both applications should follow the result; but I will inquire whether there is any general rule on the subject.

March 19. BYRNE J. In this case I have made inquiries, both of one of the masters in the Chancery Division and also of one of the taxing masters, whether there is any particular practice with reference to applications of this kind for taxation. I am told that there is no practice that they know of that the costs of such applications must in all cases follow the event of the taxation; but I do not see any reason why the costs of this application should not be borne in the same way as those of the taxation. The second summons was really part of the same application, and the costs must be paid in the same way.

H. C. R.

C. A.

The executors of T. K. Ross appealed.

The notice of appeal asked that the order made by Byrne J. upon the two summonses might be reversed; that the solicitors' summons of December 21, 1901, might be dismissed with costs, including the costs of the objection carried in by them before the taxing master; and that the solicitors might be ordered to pay the costs of the original summons for taxation, which costs had been reserved by the taxation order, and also the costs of the executors' summons of December 23, 1901, and of the appeal.

The appeal was heard on April 23 and 24, 1902.

Levett, K.C., and *Hon. T. H. Watson*, for the appellants, the executors. The question is whether a sum paid by a solicitor for estate duty is a "disbursement" within s. 37 of the Solicitors Act, 1843. A solicitor cannot, by including in his bill of costs, as disbursements, items which ought to be included in his cash account, swell his bill so as to make it impossible for his client to get one-sixth taxed off, and thus be allowed the

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costs of taxation. Estate duty is a debt to the Crown by the executor with which the solicitor has nothing to do; and it cannot, by being passed through the solicitor's hands, be properly included in his bill of costs.

[STIRLING L.J. referred to *In re Taylor, Stileman & Underwood.* (1)]

Our contention must be right in principle. A solicitor has a lien on his client's papers for his taxable costs, charges, and expenses incurred by him as a solicitor, and all counsel's fees are properly disbursements, even when they are the subject of a special agreement: *In re Harrison.* (2) But estate duty is not a taxable item. *In re Bedson* (3) would appear to be an authority for the proposition that legacy duty and probate duty were disbursements; but the only point really decided in that case was that an item which is properly a disbursement does not cease to be so from the fact that the solicitor has taken security for it. In *In re Remnant* (4) the Master of the Rolls requested the taxing masters to give their opinion as to the meaning of professional disbursements, and in their certificate, which the Master of the Rolls adopted, they stated that "legacy or residuary duties or other payments of a like description" were not disbursements, but ought to be charged in the cash account. That would include probate duty and estate duty. *In re Haigh* (5) is a distinct decision that legacy duty is not a disbursement.

In re Lamb (6) no doubt decides that probate duty is a disbursement; but that case is disapproved of in Seton, 6th ed. p. 280, as being contrary to the practice laid down in *In re Remnant* (4), and always followed by the taxing masters; and we submit that it was wrongly decided. There is a clear line to be drawn between counsel's fees and a tax like probate duty. But even assuming that the decision may be justified on the ground of some peculiar practice which may have grown up in the Probate Court as regards the payment of that duty, we say, first, that that practice is contrary to the general practice of

(1) [1891] 1 Ch. 590.
(2) (1886) 33 Ch. D. 52.
(3) 9 Beav. 5.
(4) 11 Beav. 603.
(5) 12 Beav. 307.
(6) 23 Q. B. D. 5.

the Court in dealing with solicitor and client, and, secondly, that no such practice exists with regard to estate duty. This is a Crown debt from the executor: Finance Act, 1894, ss. 6, 9; and no power is given by the Legislature to a solicitor to pay it; if he pays it, he pays it, not as solicitor, but as agent. If the decision in *In re Lamb* (1) is to prevail, it will, in many cases, work great injustice to clients, for it will become practically impossible for a client to get the costs of a taxation, although his solicitor's bill may be justly taxable.

Norton, K.C., and *A. Poley*, for the solicitors.

[COLLINS M.R. The question is whether death duties paid by a solicitor on behalf of his client should be included in his bill of costs as "disbursements," or whether they should appear in his cash account.]

This is a matter of established custom and practice in the profession. So far has it been the custom for a solicitor to insert in his bill disbursements on account of duties that the latest edition, the 10th, of Pridmore on Bills of Costs, p. 732, edited by Scott, both author and editor being officers in the Chancery Taxing Office, contains precedents of bills that include estate duty as a disbursement, while the editions published before the decision in *In re Lamb* (1) also give precedents of bills, including payments for probate duty. *In re Lamb* (1) is a distinct authority in our favour, for Manisty J. there says (2) that on inquiry he found it was the "invariable practice to include sums paid for probate duty in bills of costs as disbursements." No doubt that was a case of probate duty, and the taxation of bills in the Probate Division is regulated by different rules from those relating to bills taxed under the Solicitors Act: Probate Rules, 1862 (non-contentious business), rr. 88–91; Tristram and Coote's Probate Practice, 13th ed. p. 684; but the same principle applies to estate duty, which is a "stamp duty," just as probate duty was: Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-s. 1; s. 8, sub-s. 16. Sect. 6, sub-s. 2, says that the executor "shall" pay the estate duty on personal property, and "may" pay the estate duty in respect of any other property. If the solicitor pays the duty on personal property

(1) 23 Q. B. D. 5. (2) 23 Q. B. D. 7.

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on behalf of his client the executor, who is obliged to pay it by virtue of his office, he pays it in performance of a professional duty in order to get from the Commissioners the document which he has been instructed by his client to get; and the payment is therefore a professional "disbursement" within s. 37 of the Solicitors Act, 1843. As to the duty on property other than personal property, the executor, according to s. 6, sub-s. 2, is not bound to pay that himself; but if he chooses to pay and requests his solicitor to do so on his behalf, the solicitor pays merely as his agent. We are not prepared to say that such a payment would be a professional disbursement within the Solicitors Act. In short, professional disbursements include everything the solicitor is obliged to pay before he can obtain a particular document for his client.

[COZENS-HARDY L.J. Upon a purchase, is not the purchaser's solicitor bound to attend the completion and pay the purchase-money before he can get the conveyance? And yet he cannot include the purchase-money in his bill as a professional disbursement.]

No; he cannot. His remuneration for attending and completing his purchase is regulated by the rules under the Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44). He is not employed to attend completion mainly to pay the money, but to attend and see that the conveyance is all right. His remuneration which he is entitled to charge in his bill is for "preparing and completing conveyance": he is not expected to find the purchase-money. If he did so it would come under the head of an "advance," which is non-taxable and cannot be moderated, and therefore should not be included in a bill of costs, but must come into the cash account: *In re Taylor, Stileman & Underwood.* (1) That is, no doubt, the general rule; but there are certain fees and payments a solicitor has to pay for his client which, though they cannot be moderated on taxation, are always included in his bill of costs as disbursements, such as payments for jury fees, stamps, or special journeys duly authorized by the client. *In re Remnant* (2) lays down the principles as to including "professional disburse-

(1) [1891] 1 Ch. 590. (2) 11 Beav. 603.

ments " in a solicitor's bill, and since that case it has been the uniform practice to include in the bill payments for duties as disbursements: that practice should not be disturbed. It was settled, as to payments for probate duty, by *In re Lamb* (1) by three judges, Mathew J., Pollock B., and Manisty J.; and we submit that in this respect the Chancery Division should follow the practice of the Probate Division.

Levett, K.C., in reply. *In re Lamb* (1) is inconsistent with *In re Remnant* (2), which states the true principle. The solicitor, if he pays the estate duty himself, does so not as the solicitor, but as the agent, of the client; it is, therefore, not a disbursement by him in his professional character: *In re Lamb*. (3) An executor—who is defined in s. 22, sub-s. 1 (*d*), of the Finance Act, 1894—is liable as a debtor to the Crown, and if the Crown sues him and he gives the solicitor the sum wherewith to pay the Crown debt, the solicitor cannot include that sum in his bill of costs as a disbursement. Money found by a client to enable his solicitor to pay a debt cannot possibly be called a disbursement by the solicitor.

[He also referred to s. 27 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), as to the duties on probates and letters of administration.]

Cur. adv. vult.

May. 7. The judgment of the Court (Collins M.R., Stirling and Cozens-Hardy L.JJ.) was delivered by

STIRLING L.J. The question on this appeal is whether the costs of taxation of a bill of costs under the common statutory order are to be paid by the clients or by the solicitors. That depends on whether one-sixth of the amount of the bill has or has not been taxed off. The bill is for the costs of obtaining the probate of a will on behalf of the executors, who were the clients. In the course of obtaining the probate the solicitors paid the estate duty, amounting to 117*l.* 4*s.* 4*d.* out of a sum of 130*l.* paid by the clients to the solicitors on general account. In the bill as delivered the professional charges, amounting to

(1) 23 Q. B. D. 5. (2) 11 Beav. 603.
(3) 23 Q. B. D. 6.

C. A. 1902 KINGDON & WILSON, *In re.*

101*l.* 1*s.* 5*d.*, are first entered; to this is added the estate duty, making a total sum of 218*l.* 5*s.* 9*d.*; then there is deducted the 130*l.* paid on account, leaving a balance due to the solicitors of 88*l.* 5*s.* 9*d.* From this bill there has been taxed off an amount of 24*l.* 17*s.* 10*d.* If the estate duty is properly included in the bill, less than one-sixth has been taxed off; but, if the estate duty ought (as is contended on behalf of the clients) to have been entered in the solicitors' cash account, and not in the bill, more than one-sixth has been taxed off. Byrne J. has decided, on the authority of *In re Lamb* (1), that the estate duty was properly included in the bill of costs. We think that the learned judge was bound by *In re Lamb* (1), which was decided by a Divisional Court, consisting of Pollock B. and Manisty J., who affirmed Mathew J. sitting at chambers. The real question is whether the rule established in that case ought to be upheld by the Court of Appeal, before which it is now brought for the first time.

This subject was carefully inquired into by Lord Langdale in the case of *In re Remnant* (2), decided in 1849, and the following rule was laid down: "That those payments only, which are made in pursuance of the professional duty undertaken by a solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs." The case of *In re Lamb* (1) was intended to be decided in accordance with this rule, and it was evidently believed by both the learned judges who constituted the Divisional Court that it was the settled practice to include sums paid for probate duty in bills of costs.

It was strongly pressed upon us in argument that, if *In re Lamb* (1) be upheld, it will be practically impossible in a large number of cases for a client to obtain the costs of the taxation to which a bill may have been justly subjected, and we think that such is the case. We have consulted one of the taxing masters of the Chancery Division, and are informed by him that, from the time of the decision in *In re Remnant* (2) down

(1) 23 Q. B. D. 5. (2) 11 Beav. 603, 613.

to that in *In re Lamb* (1), it was the settled practice not to include sums paid for probate duty in bills of costs; that the taxing masters of the Chancery Division consider that the decision in *In re Lamb* (1) was based on imperfect or inaccurate information; that the effect of it is to discourage the taxation of bills which ought to be taxed; and that the adherence to it has, in their opinion, operated unfairly to clients in the past, and (regard being had to the increased duty now payable) is likely still more so to operate in the future. We are informed that, although the taxing masters have followed the decision in *In re Lamb* (1) when the point has been taken before them, yet that many eminent solicitors still adhere to the practice as it existed before the decision in *In re Lamb* (1), and do not include payments for probate duty in their bills. We have also consulted one of the registrars of the Probate Division, who is conversant with the taxation of costs in that Division, and are informed by him that, although the practice there, so long as he has known it, has been regulated by *In re Lamb* (1), he is also of opinion that in many cases it leads to injustice being done.

In these circumstances we think that *In re Lamb* (1) ought to be overruled, and that payments for estate duty ought not to be included in bills of costs. In what precedes it has been assumed that estate duty stands on the same footing as probate duty. It is, however, to be observed that estate duty is not, like the original probate duty, merely a stamp duty, but is one for which the executor is personally accountable: see the Finance Act, 1894, s. 6, sub-s. 2; s. 22, sub-s. 1 (*d*). Although we do not base our decision on this distinction, we consider it favourable to the adoption of the course which we regard as the proper one.

The appeal will therefore be allowed, with costs here and below, and an order made substantially in accordance with the notice of appeal.

Solicitors: *Kingdon, Wilson & Webb, for Frankish, Kingdon & Wilson, Hull; Collyer-Bristow, Hill, Curtis & Dods.*

(1) 23 Q. B. D. 5.

G. I. F. C.

C. A.
1902
May 9, 10.

In re PUCKETT AND SMITH'S CONTRACT.

[1901 P. 35.]

Vendor and Purchaser—Failure to shew Title—Misdescription—Latent Defect —Underground Culvert for Water.

Land was sold subject to a condition that, "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

The purchaser bought the land for building purposes, and this was known to the vendors. They represented to him that it was suitable for building, and that there was no restriction as to the class of houses to be erected. Before he entered into the contract the purchaser inspected the property. Some time after the contract he discovered that there was an underground culvert for water running across the land. There was nothing in the plan which was shewn to him to indicate the existence of this culvert, and the vendors, who were trustees of a former owner, were not aware of it. In the opinion of the Court, no reasonable inspection would have enabled the purchaser to discover the culvert:—

Held, that the above condition did not apply, and that the culvert was a substantial drawback to the use of the land for building purposes, so that the purchaser would not get that for which he contracted:

Held, therefore, that *Flight* v. *Booth*, (1834) 1 Bing. N. C. 370; 41 R. R. 599, applied, and that a good title had not been shewn by the vendors in accordance with the contract.

Decision of Kekewich J. affirmed.

In re Brewer and Hankins' Contract, (1899) 80 L. T. 127, distinguished.

APPEAL against an order made by Kekewich J. upon a summons taken out by vendors under the Vendor and Purchaser Act, 1874, declaring that the objections to title and requisitions of the purchaser in respect of the property comprised in the contract for sale had not been sufficiently answered by the vendors, and that a good title had not been shewn in accordance with the contract.

The contract for sale was entered into on October 30, 1899. The property was situate at West Molesey, Surrey. It had previously been offered for sale by auction, but had not then been sold. It was sold to the purchaser by private contract

subject to the conditions of sale at the auction, except (inter alia) condition 7, which was struck out. The contract was contained in a copy of the particulars of sale used at the auction, in which the property was described as "valuable freehold property," comprising a residence with "a small well-timbered park," the whole comprising 13A. 1R. 38P., and it was stated that the property "possesses important frontage to Walton Road, with a valuable prospective building element." Condition 6 provided as follows:—

"The property is believed and shall be taken to be correctly described, and being open to inspection the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars, the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

Condition 7: "The property is sold subject to such chief, quit and other rents, rights of way, water, drainage and other easements, restrictions and liabilities, as are mentioned in the particulars, or as may be ascertained to be charged thereon, or to affect the same, and to any subsisting liability under covenant, or otherwise, to repair fences or roads. The purchaser shall not be entitled to require the legal apportionment of any tithe rent-charge."

The price which the purchaser agreed to give for the property was 4000*l*. The vendors were trustees under the will of the former owner of the property.

The purchaser, who was a contractor and was in the habit of buying land for building purposes, having seen an advertisement which stated that this property was for sale, wrote to Messrs. Nightingale, Phillips & Page, who were acting as agents for the vendors, inquiring about the property, and he received from them the following reply, dated August 5, 1899: "In reply to your letter of yesterday, the old-fashioned residence and 13½ acres, advertised for sale, near Hampton Court, suitable for development, is known as 'The Grange,' West Molesey, one mile from Hampton Court Station. We inclose a small plan for your guidance. The price is 5000*l*., or we would submit an offer of not less than 4500*l*. There are no

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restrictions as to the class of houses to be erected, and it is admirably adapted for the erection of cottages, which are in great demand in the neighbourhood, being quite close to the new works of three London water companies, where thousands of mechanics are permanently employed at high wages. We also inclose an order to view."

After the receipt of this letter the purchaser inspected the property, having with him a plan which was attached to the particulars and conditions of sale which had been prepared for the auction. After some negotiation he entered into the contract for purchase with a view to laying out the property for building.

Some time afterwards, before the completion of the purchase, the purchaser discovered that there was running across the property, at a short distance beneath the surface, a culvert for the passage of water. He then made a requisition that the vendors should divert the culvert, so that it should no longer pass through the property, or, in the alternative, that the vendors should make compensation by an abatement of the purchase-money for the existence of the culvert, which he considered would seriously diminish the value of the property for building purposes. The vendors would not comply with this requisition, and ultimately they took out the summons upon which the above order was made. The culvert had been constructed by a former owner of the property in order to cover an open watercourse. Its existence was not in any way indicated by the plan, and it was in fact unknown to the vendors until its discovery by the purchaser. The Court came to the conclusion upon the evidence that no reasonable amount of inspection would have disclosed to the purchaser the existence of the culvert.

The vendors appealed.

A. Turnour Murray, for the vendors. The question is whether the existence of a covered watercourse forming a culvert across the property is a defect of title. The purchaser, who is a builder, says that the defect is such that he cannot carry out in its entirety the object for which he bought the

property, and that therefore he is entitled either to rescission or compensation. It is submitted that he is not entitled to rescission. This was a purchase by private contract made after full investigation, and the maxim "Caveat emptor" applies. There is no such defect as the purchaser can rely upon. The vendors, who are only trustees, were themselves ignorant of the existence of the culvert. If this is a patent defect the purchaser's case fails: *Bowles* v. *Round.* (1)

[*Buckmaster, K.C.* If it is a patent defect, no doubt "Caveat emptor" applies; but our case is that it is latent.]

The defect was not latent, for the purchaser could have discovered it if he had thoroughly inspected the property. In any case it is not a defect of title: there is nothing in the nature of an easement—no question of a dominant and servient tenement. The law is clear that, if the vendor himself is not aware of any defect at the date of the contract, the purchaser must take the estate with all its faults: *Lucas* v. *James* (2); Sugden's Vendors and Purchasers, 14th ed. p. 1.

[COLLINS M.R. I should not think authority was required for that.]

This is not a defect at all, but a mere incident of property.

Condition 6 applies. Both parties are equally innocent, and the contract cannot be set aside in the absence of deceit on the part of the vendors, or a warranty by them.

[STIRLING L.J. referred to *Flight* v. *Booth.* (3)]

The purchaser must shew a failure of consideration: *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (4); and this he has not done. There is nothing to prevent the purchaser from building over the culvert. There is no implied warranty on a lease of a house or of land that it is reasonably fit for habitation, occupation, or cultivation: *Hart* v. *Windsor.* (5) The defect is one of trivial importance; it is not such that the purchaser will not get that which he intended to buy: *Jacobs* v. *Revell.* (6) An authority in favour of the

(1) (1800) 5 Ves. 508; 5 R. R. 107.
(2) (1849) 7 Hare, 410, 418.
(3) 1 Bing. N. C. 370, 377; 41 R. R. 599.
(4) (1867) L. R. 2 Q. B. 580, 587.
(5) (1843) 12 M. & W. 68.
(6) [1900] 2 Ch. 858, 867.

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vendors is *In re Brewer and Hankins' Contract* (1), a case almost on all fours with the present case.

Buckmaster, K.C., and *Davenport*, for the purchaser. Condition 6 does not apply. The evidence shews that the purchaser would not have bought the property if he had known of the existence of the culvert. He could not have discovered the culvert by the exercise of any reasonable care when he inspected the property. The vendors themselves were ignorant of its existence, and the plans did not shew it or even suggest it. The purchaser will not get that which it was known to the vendors he intended to buy—an estate the whole of which would be available for building. *Flight* v. *Booth* (2) applies; also *Ashburner* v. *Sewell* (3), where it was held that a right of way over part of the property, of which neither vendor nor purchaser was aware, was a latent defect of title entitling the vendor to rescind, notwithstanding a compensation clause in the contract. *In re Brewer and Hankins' Contract* (1) is distinguishable, and has no application to the present case. There the land was not bought for building, and there were restrictive covenants which prevented building upon it. Here the property is sold subject to a burden which was not disclosed, and which the purchaser cannot remove, so that it renders the purpose for which he bought the property, namely, building, impossible.

[They were stopped by the Court.]

A. Turnour Murray, in reply.

COLLINS M.R., after stating the description of the property in the particulars of sale and reading the letter of August 5, 1899, continued:—The purchaser was a contractor, and it was known to both parties here that he was not buying the property for the purpose of residence, but with the view of developing it, as pointed out in the particulars, for building. That is apparent from the letter of August 5, and also from the words to which I have referred in the particulars of sale. The material condition embodied in the contract is the 6th. [His Lordship read conditions 6 and 7, and continued:—] Condi-

(1) 80 L. T. 127. (2) 1 Bing. N. C. 370; 41 R. R. 599.
(3) [1891] 3 Ch. 405.

tion 7 had been erased, but its erasure is significant. These are the conditions by which the purchaser was bound, and with the letter of August 5 there was sent to him a small plan which shews at all events the shape and proportions of the property. The purchaser saw that, and also the particulars and conditions of sale and the plan which was upon them, and he went to inspect the property. He examined it, and then came away and made his offer, which was accepted. It now turns out that, without the knowledge of the vendors and without the knowledge of the purchaser after inspection, there runs across the property an underground culvert. When we look carefully at the plan, we find in it an indication of a ditch bordering on the property which leaves it at a point which has been marked B, and goes out into the adjoining land, we do not know where; but we now know that that which appeared to be a dry ditch at the time when the property was inspected by the purchaser is connected with this culvert passing under the property and taking water from one side of it to the other. It was suggested that the purchaser ought to have found that out by inspection, and, if by any reasonable inspection he could have found it out, of course he would have had no right to complain.

The first question, therefore, is this: Was it contemplated by the parties and were they dealing on the basis that the land was reasonably capable of being made fit for building purposes? I think it is perfectly clear that both parties were dealing on that basis.

The second question is, Could the purchaser by reasonable inquiry and inspection have ascertained the existence of this culvert, which is in a very essential way a drawback to the use of the property for building purposes? The evidence on this point seems to me to be really all one way. It is admitted that the vendors themselves knew nothing about the culvert. The plans when carefully examined appear to me to give no fair indication of its existence. The purchaser, after carefully going over the property with the vendors' agent, did not discover the existence of this culvert. Unless that was the result of a want of ordinary care on his part, he is entitled to say that he

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could not by any reasonable inspection have discovered it. Is this culvert, then, such a substantial defect as will within the meaning of the authorities alter the nature of the thing which he intended to buy, and oblige him to take (if he does take it) a thing essentially different from that which he agreed to take? Upon that I think the law is clear, and it is well stated in *Flight* v. *Booth* (1), which has been referred to by my brother Stirling, and has been adopted in the text-books, among others in Fry on Specific Performance, 3rd ed. pp. 558. In that case the particulars of the sale of leasehold property had specified certain restrictions upon the use of the property, and when the lease was produced it appeared that the statement did not accord with the fact, and that the restriction was more extensive, and it was held that the purchaser was entitled to rescind his contract. Tindal C.J., in giving the judgment of the Court, said (2): "Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale." Here the misdescription consists in the representation in the particulars that the property has a "valuable prospective building element," coupled with the statement in the letter of August 5 that the property was "suitable for development," and "there are no restrictions as to the class of houses to be erected." That is the description given of the land; but the fact is that under the land lies this covered culvert which may take flood-water from the ditch, which was dry when the purchaser saw it, and which, of course, may be a most substantial drawback to the value of a building estate. There is evidence that it would cost 500*l.* to deal with the culvert in such a way as to make it possible to use the land for such building as was contemplated by both parties. Under these circumstances the

(1) 1 Bing. N. C. 370; 41 R. R. 599. (2) 1 Bing. N. C. 377.

learned judge has held that the vendors have not shewn a good title to the property in accordance with the contract, and I think he was perfectly right in so deciding. The appeal must be dismissed.

STIRLING L.J. I am of the same opinion. I think that condition 6, on which the vendors rely, does not avail them on the present occasion. I think it applies only to such matters as might be discovered by an inspection of the property with reasonable care, that is, an inspection of the property itself, and that it does not impose upon an intending purchaser the duty of going upon adjoining properties, or even of walking along neighbouring roads, from which the property might be visible. That being so, it seems to me that the question which remains is not really one of title, but is whether the case falls within the rule which was laid down by Tindal C.J. in *Flight* v. *Booth*. (1) In my opinion, seeing that the property was plainly sold to the purchaser for the purpose of his building upon it, the case does fall within that rule. The decision in *In re Brewer and Hankins' Contract* (2), which came before myself and afterwards before the Court of Appeal, was based in both Courts on the particular facts, which did not bring the case within the rule in *Flight* v. *Booth*. (3) One material difference between that case and the present is that there it was quite clear that the property was not offered for building purposes. I think, therefore, that the appeal must be dismissed.

COZENS-HARDY L.J. I agree.

Solicitors: *T. Durant; Hare & Co., for March, Clayton & Pearson, Manchester.*

(1) 1 Bing. N. C. 377. (2) 80 L. T. 127.
(3) 1 Bing. N. C. 370; 41 R. R. 599.

W. L. C.

KEKEWICH J.

1902

May 8.

VAN PRAAGH *v.* EVERIDGE.

[1901 V. 863.]

Vendor and Purchaser—Specific Performance—Mistake—Sale by Auction—Purchase of wrong Lot.

At a sale by auction of landed property the defendant purchased one lot by mistake for another. The price was not extravagant, and the mistake was solely due to the defendant's own carelessness:—

Held, no defence to an action for specific performance.

Semble, *Malins* v. *Freeman*, (1836) 2 Keen, 25; 44 R. R. 178, is inconsistent with the principle of *Tamplin* v. *James*, (1880) 15 Ch. D. 215.

THE plaintiff, Mrs. Edith Sarah Van Praagh, widow, was the owner of a freehold house situate at Frognal, Hampstead, and known as Saradith. In September, 1901, this property was put up for sale by auction, but it was bought in at 4500*l*. On November 18, 1901, this property was again put up for sale by auction by Messrs. Farebrother, Ellis & Co. They also offered for sale at the same time two other properties, namely, an estate known as Parson's Mead, Ashtead, and No. 24, Cullum Street, in the City of London. The defendant, who was a builder of Surbiton, frequently purchased properties by auction with a view to develop them. His attention had been called to the particulars of Parson's Mead, Ashtead, and, after going to Ashtead to inspect the property, he resolved to bid for it. On November 18 he came up to London for this purpose and attended the auction. He was present in the auction-room at the commencement of the sale, and took a seat in the second or third row from the front. He was somewhat deaf. Affixed to the auctioneer's rostrum was a large notice stating the order of sale to be as follows: "1. Saradith, Hampstead; 2. Parson's Mead, Ashtead; 3. 24, Cullum Street." There were also distributed about the sale-room a number of smaller printed notices to the same effect. The auctioneer, Mr. Breach, on entering the rostrum began by stating the order in which he would offer the properties, and he then proceeded to offer the Hampstead property, which he fully described. The defendant bid three or four times for this

property, and it was ultimately knocked down to him at 4500*l*. Mr. Breach then sent his clerk to the defendant to obtain his name and address for the purpose of filling up the necessary contract; but the defendant objected that he had not purchased the Hampstead property, but had purchased the Ashtead property. The clerk then informed Mr. Breach that the defendant denied having bought the Hampstead property; but Mr. Breach, who had proceeded some way with the description of the Ashtead property, declined to interrupt the sale of that property, which was ultimately bought in at 16,000*l*. Before lot 3 was offered the defendant had an interview with Mr. Breach, and told him that he had made a mistake and believed that he was bidding for the Ashtead property. Mr. Breach replied that he must hold him to his bargain, and requested him to sign the contract. This the defendant refused to do. Accordingly Mr. Breach, before leaving the rostrum, signed the contract as agent for the defendant.

The contract so signed contained two small mistakes. In the first place, it was dated October 17, 1901, instead of November 18, 1901. This mistake was due to the circumstance that the particulars and conditions of sale had been printed with a view to a sale on October 17, 1901, which was eventually postponed till November 18, and, although the date was altered in the particulars, the original date had by inadvertence been allowed to remain in the conditions and in the printed form of contract annexed thereto. Secondly, the Christian names of the vendor were filled in by the auctioneer in the wrong order.

The defendant having repudiated the contract, the plaintiff commenced this action for specific performance and damages.

The defendant by his defence resisted the action on the ground of mistake, and alleged that he never agreed to purchase the Hampstead property; he also pleaded that there was no memorandum of the alleged contract sufficient to satisfy the Statute of Frauds.

Renshaw, K.C., and *Frederic Thompson*, for the plaintiff. (1.) An auctioneer at the time of the sale has authority to sign

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the contract both for the vendor and for the purchaser: *Emmerson* v. *Heelis* (1); *Sims* v. *Landray* (2); *Bell* v. *Balls*. (3)

(2.) The plaintiff is entitled to specific performance notwithstanding the mistake of the purchaser, where the mistake is not induced by the conduct of the vendor, but is due to his own negligence. The case most against the plaintiff on this point is *Malins* v. *Freeman* (4); but the principle of that decision has not been fully recognised in modern cases. In *Tamplin* v. *James* (5) James L.J. lays it down that, "if a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained"; and the law is laid down in the same way by Kay J. in *Goddard* v. *Jeffreys*. (6) Even insanity is not a defence to an action of contract, unless the defendant can prove that the insanity was known to the plaintiff: *Imperial Loan Co.* v. *Stone*. (7)

Stewart-Smith, K.C., and *Norman Craig*, for the defendant. There is here no binding contract. The defendant thought he was buying Blackacre when, in fact, he was buying Whiteacre. There was, therefore, no consensus ad idem. This is a case of fundamental error, which nullifies the agreement. This question is discussed by Sir F. Pollock in his book on Contracts, 7th ed. p. 474. Dealing with error as to the subject-matter, he says there may be fundamental error concerning (*a*) the specific thing (in corpore), or (*b*) as to kind, quantity, or quality of the thing. This is a case of error in corpore. In such a case there is no bargain: *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (8), per Blackburn J.; *Raffles* v. *Wichelhaus* (9); and see *Harris* v. *Pepperell*. (10)

Further, there was no sufficient memorandum of agreement to satisfy the Statute of Frauds by reason of the mistake in the date and in the vendor's name.

As to the authority of the auctioneer, it is not suggested

(1) (1809) 2 Taunt. 38; 11 R. R. 520.
(2) [1894] 2 Ch. 318.
(3) [1897] 1 Ch. 663.
(4) 2 Keen, 25; 44 R. R. 178.
(5) 15 Ch. D. 215, 221.
(6) (1881) 30 W. R. 269.
(7) [1892] 1 Q. B. 599.
(8) (1867) L. R. 2 Q. B. 580, 586–8.
(9) (1864) 2 H. & C. 906.
(10) (1867) L. R. 5 Eq. 1.

that he had any actual authority, and we submit that it was revoked by the defendant in the auction-room.

In *Malins* v. *Freeman* (1) it was not necessary to decide that there was no contract, but Lord Langdale's observations are in favour of that view. There, as here, the defendant was bidding for a different property. *Tamplin* v. *James* (2) is distinguishable, because in that case the defendant was bidding for the same property, but the mistake was as to the area of the property, and there was also gross negligence on the part of the defendant. This Court will not assist the plaintiff to take advantage of the defendant's mistake where he points out the mistake to the plaintiff as soon as he discovers it: *Manser* v. *Back* (3); *Webster* v. *Cecil.* (4) There is, therefore, no ground for specific performance.

KEKEWICH J., after discussing the evidence and saying that he had no reason to doubt the honesty and veracity of the defendant, and after referring to the precautions taken by the auctioneer to prevent any mistake as to the order of sale, continued as follows:—The defendant made an extraordinary blunder, which can only be explained upon the theory that the idea of Ashtead was so fixed in his mind that he could not think of anything else; but he did in fact bid for the Hampstead property, and it was eventually knocked down to him. From that moment there was a contract. I cannot understand the argument that there was no contract. The case of *Raffles* v. *Wichelhaus* (5) was relied on as establishing that there might be a case of no contract for want of consensus ad idem. The ground of the decision in that case, as explained by Sir F. Pollock in his book on Contracts, was that the contract which was made was not the contract which was sued on, and therefore was not a contract which the defendant could be called upon to perform. There was nevertheless a contract.

There being then a contract here, can there be any doubt upon the authorities that the auctioneer was authorized to sign

(1) 2 Keen, 25; 44 R. R. 178.
(2) 15 Ch. D. 215.
(3) (1848) 6 Hare, 443, 448.
(4) (1861) 30 Beav. 62.
(5) 2 H. & C. 906.

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the necessary memorandum on behalf of the purchaser? It would be a waste of time to go into the cases. The only suggestion is that the authority having been given, and referring necessarily to the time when the highest bid was given, that could be revoked at any time afterwards. But it is from that moment that the authority comes into operation, and it would be opening a wide door to fraud if the purchaser could be allowed to say to the auctioneer half an hour or an hour after the sale, "I revoke my authority; you must not sign the contract." That is entirely contrary to principle. Then it is said that there is no sufficient memorandum within the Statute of Frauds. The particulars and conditions were prepared for a sale to take place in October, and the sale was deferred, and by a slip the wrong date was left in the contract. That is not a substantial error, and cannot prevent this from being a good memorandum. Then by another slip the Christian names of the vendor were transposed. That cannot be regarded as having any importance.

The only substantial question is whether this defendant is to be let off on payment of damages, or whether a decree of specific performance ought to be made against him. That to my mind is a very difficult question. According to the view expressed by Lord Langdale in *Malins* v. *Freeman* (1), it seems to me that the defendant would clearly be entitled to escape specific performance. The language applied by the learned judge to the defendant in that case fits this defendant admirably. He says: "I am of opinion that the defendant never did intend to bid for the estate. He was hurried and inconsiderate, and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it." That, of course, cannot be said here, because the defendant pointed out the mistake immediately; but the words "hurried and inconsiderate" seem to cover this case exactly. There are, however, a great many subsequent cases in which a somewhat different view of the law has been expressed, and there are one or two to which I think it necessary to refer. The first is the case of *Tamplin* v. *James* (2), which came before several judges whose

(1) 2 Keen, 25, 35; 44 R. R. 178.

(2) 15 Ch. D. 215, 217, 221, 222.

views are entitled to very great respect. It came in the first instance before Baggallay L.J., sitting for Malins V.-C., and it went from him to the Court of Appeal, consisting of James L.J., Brett L.J., and Cotton L.J. In that case there was clearly a mistake on the part of the defendant as to the amount of the property contracted to be sold, and the question was whether there should be specific performance or damages. How the Lords Justices applied the law to the facts of that particular case is immaterial, but I cite it for the general observations which were made. Baggallay L.J. says: "It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced." With great respect to the learned judge, those words appear to me to raise almost more questions than they solve, because it is extremely hard to know what would be doing injustice to the defendant. Cotton L.J. says: "I will not attempt to define the cases in which the Court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered"; and James L.J. says: "Perhaps some of the cases on this subject go too far," i.e., too far in the defendant's favour, "but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it." There we get a little comment on what Baggallay L.J. meant by injustice being done to the defendant. Suppose this gentleman had been saddled with a residential estate requiring considerable expenditure, and one incapable of being used for the purpose for which he wanted it, and suppose that he could not reside there himself and might find it difficult to let it. That might be a case of hardship. It is very difficult to say whether it would be so or not.

The next case to which I desire to refer is the case of *Goddard* v. *Jeffreys* (1), which was before Kay J. There the learned

(1) 30 W. R. 269, 270.

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judge lays down the law as follows: "Speaking generally, I understand the rule to be this, that the purchaser may escape from his bargain on the ground of mistake, if it was a mistake to which the vendors contributed; that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors, if the mistake was entirely his own, then the Court ought not to let him off his bargain on the ground of mistake made by himself solely, unless the case is one of considerable harshness and hardship." That is putting in different language what was said by James L.J. in *Tamplin* v. *James*. (1) I now turn to the last edition of Fry on Specific Performance. The learned author refers to many of the cases on this subject, and quotes at considerable length the judgments in *Tamplin* v. *James* (1), and then he adds this (pl. 765): "Indeed, it seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would be to open the door to perjury and to destroy the security of contracts." Now, in this case the evidence shews that the blunder was entirely the defendant's own; there was nothing whatever on the part of the vendor to induce the blunder. Therefore we get rid of that objection to specific performance. There was no contributory negligence by the vendor. Then is there any hardship amounting to injustice in keeping the defendant to his contract? I do not think there is. I have evidence that this property may be used in the way in which the defendant intended to use the Ashtead property. It is his business to buy and develop estates, and there is no reason why having bought this he should not develop it. He has bought it at a price which it is true had not been reached before, and perhaps would not have been reached on this occasion but for the amount which he himself bid for it. Still it was not an extravagant price. I do not see any hardship. I do not doubt the honesty of this gentleman in saying that he made a blunder, yet, on the general principles referred to by Sir Edward Fry, to

(1) 15 Ch. D. 215.

permit such a defence would be to open the door to perjury and destroy the security of contracts. If the Court relieves this gentleman who honestly confesses his blunder from performing his contract, that would be inviting some one else to come here dishonestly to get off his bargain. It seems to me that the defendant has entered into a contract from which he is not entitled to be relieved, and that there must be judgment for specific performance.

But if specific performance were refused, the defendant would be liable in damages. While, therefore, I have the materials before me and the evidence is fresh in my mind, I think it best, in case the defendant should be advised to take the opinion of another Court, that I should say what I think about the damages. One thing the defendant must certainly pay, and that is the expenses of another auction. Besides that, there is the depreciation of the property. That is extremely difficult to calculate, because the defendant was the only bidder at this sale who went up to near the price at which the property was knocked down. There had been a failure before, and, although the price ran up to 4500*l.*, I think I must take it that that price would not have been reached in any other way. Having regard to the previous failure to sell this property, I must take it that the property was not worth that sum. The difficulty is to estimate by how much the value of the property is decreased by the defendant's repudiation. The only real way to ascertain that is by putting up the property for sale by auction again. I can only arrive at the amount in the roughest possible way. I think that if I say that the defendant's repudiation has prejudiced the vendor to the extent of 250*l.*, I shall be giving her quite as much as she is entitled to on that head. Upon the evidence before me, I assess the costs of a fresh auction at 150*l.* Therefore, if I were to refuse specific performance I should give the plaintiff 400*l.* damages. In either case the plaintiff will have the costs of the action.

Solicitors: *Law & Worssam; Edward Chester.*

H. B. H.

KEKEWICH J.

1902

May 27.

In re LEGH'S SETTLED ESTATE.

[1900 L. 1035.]

Settled Estate—Capital Moneys—Rebuilding principal Mansion-house—Dry-rot—Salvage—General Jurisdiction of Court—Incumbrance affecting Settled Land—Expense of Sewering, &c., new Streets—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (*ii.*); *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*iv.*).

Where the principal mansion-house on settled land had become infested with dry-rot, and expense to a large amount had to be incurred in rebuilding portions of the house in order to save the whole from destruction, the Court allowed the application of capital money in the rebuilding to the extent of one-half of the annual rental of the settled land under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, but declined to exercise its general jurisdiction by allowing the balance of the amount as being expenditure in the nature of salvage.

Expenses incurred by a local authority in sewering, paving, and flagging new streets on settled land were charged under statutory powers on the land, and made payable, together with interest thereon, by instalments:—

Held, that the expenses so charged constituted an incumbrance affecting settled land payable out of capital moneys under s. 21, sub-s. (ii.) of the Settled Land Act, 1882; and that out of capital moneys the tenant for life was entitled to repayment of such portion of past instalments paid by him as represented capital, and the trustees ought to pay the corresponding portion of the remaining instalments.

ADJOURNED SUMMONS.

Under and by virtue of indentures of settlement dated September 4, 1862, and April 15, 1865, certain estates in the counties of Chester and Lancaster stood limited to the use of the applicant Henry Martin Cornwall Legh and his assigns for his life without impeachment of waste, with remainder to his first and every other son successively in tail male, with remainder to Herbert Cornwall Legh and his assigns for his life without impeachment of waste, with remainder to his first and every other son in tail male, with remainder to Sydney Cornwall Legh in tail male. The applicant and Herbert C. Legh had been respectively married for many years, but there was no issue of either marriage. A power of sale was vested in the trustees, and the proceeds of any sale were directed to

be laid out in the purchase of lands in fee simple to be held on the same limitations as the settled estates.

There were capital moneys in the hands of the trustees representing the proceeds of sale of part of the settled land, and by the original summons the applicant Henry Martin C. Legh, as legal tenant for life, asked that the trustees might be directed to apply out of the capital moneys in their hands (*a*) the sum of 1173*l.* 19*s.* for instalments paid or payable to the corporation of Manchester in respect of expenses incurred in sewering, paving, and flagging new streets on a part of the settled land for the purpose of improving and developing the same as a building estate, and (*b*) the sum of 1260*l.*, or such further or other sum as might be found necessary, for taking down, rebuilding, and reconstructing such external and internal walls and other portions of High Legh Hall, the principal mansion-house on the settled estates, as might be found necessary to be taken down and rebuilt or reconstructed.

It appeared that the expenses in question in respect of street works had, under the powers of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Manchester General Improvement Act, 1851 (14 & 15 Vict. c. cxix.), been charged by the corporation of Manchester on part of the settled land, and that the repayment to the corporation was extended over a period of five or more years, with interest at 5*l.* per cent. per annum on the balance for the time being remaining unpaid. The sum of 805*l.* 17*s.* 2*d.* had been paid or advanced by the applicant as "owner" under the Acts out of his own moneys, and the sum of 368*l.* 1*s.* 10*d.* still remained due. At the time when the works were executed there was no capital money in the hands of the trustees, and no scheme was approved by them.

With reference to the mansion-house, it appeared that the house, which was originally built in 1786, was so infested with dry-rot that it had been necessary to take down and rebuild a considerable part of the outside walls and also some interior walls, and to take away all infected floors, doors, and other woodwork and construct new works in their place. There was an affidavit by a surveyor who stated that 1260*l.*

was the estimated cost of the work which, so far as he had then been able to discover, was necessitated by the outbreak of dry-rot, but that he could not give a final estimate of the extent of the damage caused by the dry-rot or of the rebuilding necessitated thereby until the portions of the house already known to be infested had been removed and further examination could be made.

No preliminary scheme had been submitted to the trustees before the commencement of the work, but as soon as the surveyor's report was obtained it was submitted to and approved by the trustees.

The original summons was adjourned into Court, and came on for hearing on July 21, 1900.

Mulligan, *K.C.*, and *R. J. A. Morrison*, for the applicant. The expenses of sewering, paving, and flagging the new streets were incurred in respect of improvements authorized by s. 25, sub-s. (xvii.), of the Settled Land Act, 1882, and constitute a charge upon the total ownership of the land: *Birmingham Corporation* v. *Baker*. (1) They therefore are an "incumbrance affecting the settled land" within the meaning of s. 21, sub-s. (ii.), of the Settled Land Act, 1882, and it can make no difference that the money is payable by instalments. The charge is not a rent-charge within s. 1 of the Settled Land Act, 1887, and the decisions thereunder.

The works done to the mansion-house were absolutely necessary to save the house from destruction, and they therefore amount to a "rebuilding" within s. 13, sub-s. (iv.), of the Settled Land Act, 1890. In *In re Lord Gerard's Settled Estate* (2) A. L. Smith L.J. said that he thought the sub-section might be read, "The rebuilding of the principal mansion-house or part of the principal mansion-house" on the settled land, and added, "by that I mean, assuming a wing was burnt down or assuming a part was blown down by storm or tempest, I should think it would be a wrong construction to put on this sub-section that, unless it was all blown down or all burnt, you could not apply capital money to the parts

(1) (1881) 17 Ch. D. 782. (2) [1893] 3 Ch. 252, 267.

which were." In *In re Walker's Settled Estate* (1) North J said that rebuilding was a question of fact in each particular case, and that there must be a substantial rebuilding. The works done here amount to that, and are clearly much more than structural alterations and repairs, so that the observations of Chitty J. in *In re De Teissier's Settled Estates* (2) are not applicable.

L. F. Potts, for the trustees. It is doubtful whether the tenant for life is entitled to be repaid the past instalments which he has paid to the corporation. In *In re Dalison's Settled Estate* (3) the Court refused to sanction repayment to the tenant for life of past instalments of a rent-charge created under the Improvement of Land Act, 1864. It is clear that he cannot be entitled to have paid to him out of capital moneys any part of the instalments which represent interest.

R. J. A. Morrison, for the remaindermen.

KEKEWICH J. I sanction repayment by the trustees to the tenant for life of so much of the instalments under sub-head (*a*) of the first paragraph of the summons as represents payments of capital, and I authorize the trustees to pay off the remaining sums due to the corporation of Manchester to the extent of capital only. I do not allow interest in either case. The rest of the summons must stand over generally, as I think it is better not to make an order until the completion of the necessary work. There will be liberty to restore.

The necessary work on the mansion-house being completed the application again came on for hearing on May 27, 1902. The summons as amended asked that the sum of 17,109*l.* 7*s.* 3*d.* might be applied out of capital moneys in the hands of the trustees for the taking down, rebuilding, and reconstruction of the mansion-house.

The damage caused to the mansion-house by the dry-rot has proved to be very much more extensive than had been anticipated, and when some of the infected parts had been removed

(1) [1894] 1 Ch. 189. (2) [1893] 1 Ch. 153.
(3) [1892] 3 Ch. 522.

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LEGH'S SETTLED ESTATE, *In re.*

it appeared, on the further investigation which was then rendered possible, that the only way to eradicate the dry-rot and save the house from becoming ruinous was to reconstruct a very considerable portion of the premises with entirely new materials. Accordingly, a large portion of the outer walls had been rebuilt and also portions of interior walls, and nearly the whole of the ground floor was relaid, and the earth under it excavated to a depth of from one to three feet, the surface being then concreted, new sleeper walls built, and thorough ventilation provided. On the first and second floors many of the rooms had to be entirely or in part provided with new floors, and it was also necessary to reconstruct a great part of the roof.

The above-mentioned works were necessary in order to prevent the further spread of the dry-rot, and to preserve the mansion-house from destruction. At the same time certain additions and improvements were executed at a cost of 1962*l.* 16*s.* 3*d.*, this sum being included in the 17,109*l.* 7*s.* 3*d.* claimed by the summons.

It had not been possible to draw up and submit to the trustees any complete scheme or estimate of the work required to be executed; but as the work was proceeded with the trustees were from time to time informed of what was being done, and they had signified their approval thereof.

The amount of capital moneys in the hands of the trustees was 18,343*l.* 11*s.* 3*d.*, and the annual rental of the settled estates was 22,153*l.* 13*s.* 1*d.*

Mulligan, K.C., and *R. J. A. Morrison*, for the applicant. It is submitted that the mansion-house has been rebuilt to an extent sufficient to constitute a "rebuilding" within s. 13, sub-s. (iv.), of the Settled Land Act, 1890, and therefore a sum not exceeding one-half of the annual rental of the settled land can be applied in defraying the cost of the rebuilding.

The capital moneys in the hands of the trustees have arisen from the sale of land, and under the settlement are directed to be laid out in the purchase of land. The case is therefore within the principle of *Drake* v. *Trefusis* (1), where it was held that

(1) (1875) L. R. 10 Ch. 364.

the erection of farm-houses, cottages, and other buildings on the settled land was the equivalent of a purchase of land. The Court, therefore, can allow the whole expenditure of 17,109*l.* 7*s.* 3*d.*, if satisfied that it was beneficial to the estate.

But, further, inasmuch as this mansion-house has been practically saved from total destruction by dry-rot, the doctrine of salvage is applicable, and the Court under its general jurisdiction (which is unaffected by the Settled Land Acts) can, in addition to the 11,076*l.*, allow the rest of the expenditure, that is to say, the total sum claimed, less the sum of 1962*l.* 16*s.* 3*d.*, which was expended on additional improvements: see *In re Montagu* (1), *In re Hawker's Settled Estates* (2), and *In re Willis.* (3)

L. F. Potts, for the trustees, adopted the same arguments.

R. J. A. Morrison, for the remaindermen, consented to the application.

KEKEWICH J. This case raises an entirely new point, which is deserving of attention. The mansion-house on this settled estate, which is of considerable magnitude, was affected with dry-rot, and it was impossible to ascertain for some time how far the dry-rot had extended, and as, according to my experience, always happens, when it is not possible to ascertain the extent of such damage, it was afterwards found to be much larger than any one anticipated. The result has been that the mansion-house has been really rebuilt. Of course, it is not to be left out of sight that some additions have been made and modern improvements introduced, but there has been a new mansion constructed. It includes work which is known in shipping cases as "new for old." An allowance is always made in estimating the value of work on a ship for the fact that new work is substituted for old, and that thus to the extent of the new work the ship when repaired is much better than it was before. So it is here. The house has been really rebuilt throughout. Supposing the Settled Land Act of 1890 had not been passed, the difficulty in the way of applying

(1) [1897] 2 Ch. 8. (2) (1897) 66 L. J. (Ch.) 341.
(3) [1902] 1 Ch. 15.

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capital money to recoup this expenditure might have proved insuperable. I need say no more, because the Act of 1890 has enabled the Court to give its sanction to capital money being applied for certain things as improvements under the Act of 1882, and to include in them "the rebuilding of the principal mansion-house on the settled land." It is also immaterial to consider the details of the rebuilding, and how far partial rebuilding is really equivalent to rebuilding. It is extremely difficult to draw the line and lay down any rule. I am satisfied that there was of necessity a rebuilding of the mansion-house. Therefore, if the Act contained simply the provision which I have mentioned, I should consent to some expenditure on that rebuilding being repaid out of capital moneys in the hands of the trustees. But the Act goes on to say, "provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land." Taking the annual rental of the settled land here as 22,153*l.*, one-half of that is 11,076*l.* I am satisfied by the evidence that the sum of 11,076*l.* has been expended, and, therefore, I can at once consent to that total sum without going into minute figures. But then the evidence shews that 17,109*l.* 7*s.* 3*d.* has been expended, less 1962*l.* 16*s.* 3*d.* included in that total, and asked for in respect of different matters. If I can only allow 11,076*l.*, the result will be that the tenant for life will have contributed out of income something like 6000*l.* himself. It is insisted on behalf of the tenant for life that, though I cannot give him the whole sum under the Act, I can give him the rest—that is, the 6000*l.* under the head of salvage. Now, the Court has gone very far in some cases in allowing money to be expended by way of salvage, which really means preservation—that is, preserving the thing in question from becoming nothing and being destroyed. I am asked under that head to sanction this further expenditure, but I do not see my way to do that. The Courts have again and again been exceeding careful in applying the principle of salvage; judges have applied it where they thought it ought clearly to be applied; but the judges have all, including myself, considered that applications based upon that doctrine must be

looked at with scrupulous care. It seems to me that to extend the application of the principle to a case of this kind would be to carry it to a novel and dangerous extent. There is much plausibility in the view put forward by this tenant for life, and I sympathise with him entirely; it is very hard that he should have had to rebuild the house out of his own income. But of course the house which has now been erected is a different house from that which stood there before. I have no doubt, because I am entitled to take cognizance of such things, that it is a very much improved mansion-house, modern, and much more convenient, more valuable, and more suitable for letting purposes. But it is impossible for any one, judge or other, to say, "So much of this money has been expended on salvage, and so much on improvements." What the tenant for life wants me to do is to allow him as much as I can under the Act of 1890, and then allow the rest as salvage. Would it be possible for me to allow this as salvage alone for the whole? It would be necessary to go into it with extreme care in order to say how much had been expended in preserving the mansion-house—that is, in taking care that there should be a mansion-house on the settled land. It would be impossible for me to do that. It is still more impossible to find out how much of this money has been expended in salvage proper. I think I should be making a precedent going far beyond anything that the Court has yet done, if I were to say that the tenant for life can be allowed this expenditure as salvage. And I say so particularly because it is impossible to discriminate between what has been spent on salvage and what has not.

[His Lordship accordingly made an order allowing the application of 11,076*l.* out of the capital moneys in the hands of the trustees.]

Solicitors: *Philpot & Morrell, for Potts, Potts & Gardner, Chester.*

C. C. M. D.

BYRNE J.
1902
March 18, 20.

WALTER *v.* ASHTON.

[1902 W. 822.]

Injunction—Unauthorized use of Name—Holding out as Partner—Misrepresentation—Reasonable Probability of Risk and Liability.

A dealer in cycles having advertised his goods in a manner which satisfied the Court that he intended the public to believe that the proprietors of *The Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with the sale of "Times" cycles:—

Held, on the authority of *Routh* v. *Webster*, (1847) 10 Beav. 561, that as the plaintiffs, the proprietors of *The Times*, were exposed to some risk and liability by the unauthorized use of the name of their newspaper by the defendant, and that as there was a reasonable probability of *The Times* being exposed to litigation, and possibly being made responsible, had the plaintiffs not taken steps to disconnect the name of their newspaper from the advertisement and circulars issued by the defendant, an interim injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were in fact offered for sale by the plaintiffs, or that he was carrying on business as a department of *The Times*, or in any way holding out *The Times* to be the owners of or connected with his business.

Principles on which injunctions are granted in cases of this nature discussed.

MOTION.

This action was brought by the plaintiff, on behalf of himself and all other the proprietors of *The Times* newspaper, to restrain the defendant from advertising the sale of his cycles in such a way as to suggest or represent that he was carrying on business as a department of, or in connection with, *The Times*. An application was now made for an interim injunction restraining the defendant, his manager, servants, and agents, "from publishing advertisements and issuing or distributing circulars or letters containing statements asserting or suggesting that cycles offered by him for sale are in fact offered for sale by the proprietors of *The Times* newspaper, and from representing that he is carrying on business as a department of or in connection with *The Times*, or in any way holding out

The Times newspaper, or the proprietors thereof, to be the owners of his business."

The circumstances in which the application was made were shortly as follows: For some time past the proprietors of *The Times* had been in the habit of issuing literary productions to be purchased by instalments, and amongst other works so issued were the "Encyclopædia Britannica," the "Century Dictionary," and "*The Times* Atlas." A circular announcing the sale of these works was sent out to persons likely to buy, and with the circulars were inclosed envelopes for reply. These circulars, which were type-written on thin paper, were headed, in old English letters, "*The Times*," and were signed at the foot, "Yours faithfully, the Manager." The envelopes inclosed, which were generally of a pale green colour, had the address printed on them to "The Manager, *The Times*, Printing House Square."

It appeared that the defendant had some time since devised a scheme for selling bicycles by instalments, but giving immediate delivery of the bicycles in a similar way to that in which *The Times* had sold the "Encyclopædia Britannica"; and accordingly he associated himself with the *Daily Express* newspaper, and advertised his cycles in that paper, and had, as was stated, a very large sale for them. Shortly afterwards the defendant devised a fresh scheme for selling another kind of cycle, which he called "The Times Bicycles."

On February 27, 1902, the manager of *The Times* received two letters calling his attention to an advertisement of "The Times" cycles in the *Daily Mail* of that date; one letter inclosed a circular, and continued: "Kindly advise me whether this is in connection with your newspaper. It appears to me to be merely an imitation of the letter I received from you in reference to the 'Encyclopædia Britannica.'"

The material parts of this advertisement were as follows: "The 'Times' Cycle, fitted with Dunlop tyres." "When the *Daily Express* cycle scheme was started, no less than 657 orders were received the first day of the offer, yet a heavy cash payment had to be made beforehand, a promissory note had to be signed, and in nearly every instance a guaranteeing house-

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holder was required. 'Express' cycles (excellent though they were) were not fitted with Dunlop tyres. 'The Times' cycle is the only bicycle that can be obtained on *The Times* system of monthly payments; forwarded on approval for 5*s*. All communications must be addressed to the Manager." On the same day a circular was also seen by the manager of *The Times*, which was typewritten, on thin paper, headed "Times Cycles," in old English, 59 and 60, Chancery Lane. The material parts of this circular ran as follows: "Dear Sir,—You doubtless remember the phenomenal success of the *Daily Express* cycle schemes." The circular then went on to give some of the disadvantages of that system, and continued: "With 'Times' cycles no promissory note is to be signed, no references are required, &c. We take the entire risk and responsibility, and, having a capital of over 100,000*l*. at our command for immediate use if need be, we are able to withstand almost any financial strain. . . . Please remember—and the *Daily Express* will be able to confirm this statement—that hundreds of orders requiring immediate execution had to be refused by that newspaper owing to the enormous demand for their cycles. There is even a greater possibility of our being unfortunately in a like position, but by forwarding the request at the foot of this advance letter, together with a crossed P.O. for 5*s*., or by calling here, and paying the money at our office to-day, or to-morrow, when the machines can be seen and inspected, you will be doing all that is possible to secure immediate delivery." This was signed "Yours faithfully, the Manager." It appeared that inclosed with this circular was a pale green envelope addressed for reply as follows: "Times"—Royal arms—"Cycles" (old English). The "Times" (old English) Cycle Department, 59 and 60, Chancery Lane. As several inquiries had been made at *The Times* office since the issue of these advertisements to know whether they really had been issued by the proprietors of *The Times*, the writ in the present action was issued with a view to putting an end to this method of advertisement by the defendant. Some difficulty had been experienced in finding out who "the Manager" referred to in the circular was and in effecting service of this writ upon him

when it was discovered that he was the defendant; for though the names of the makers of the tyres were given in the advertisements and circulars and the names of the manufacturers of the cycles were also specified, there was no reference to the name of the defendant. It also appeared that in the windows of the defendant's offices looking on to Chancery Lane were the words "The Times" in old English, and beneath it the word "cycles" in another type; that outside the office was a man in livery, with the word "Times" on his cap; and that the pamphlets that were in the shop had outside them "The Times Cycles." It was also stated during the course of the hearing of this motion that a clock, with the fingers pointing to five minutes past six, as in the clock in *The Times* newspaper, was stamped or painted in gold on these cycles. The defendant in his affidavit stated that there had never been any intention on his part to avoid service of the writ in this action, and that he never had any intention of holding out to the public that there was any connection between his cycles and *The Times* newspaper. He denied that the circular sent out by him had been compiled from that used by the proprietors of *The Times*, and that the envelopes inclosed were imitations of those used by *The Times*, and deposed that a clock was a very common design for commercial purposes, that for a cycle to have the same name as a newspaper which had absolutely no connection with the manufacturing firm was a common custom, and he gave numerous instances, such as "Times" cycles, "Telegraph" cycles, "Standard" cycles, "Globe" cycles, "Tit-Bits" cycles, and "Express" cycles, which had been manufactured by the various firms mentioned in his affidavit; but he also admitted that he had had two or three inquiries in his office asking whether there was any connection with himself and *The Times*, which he of course denied.

Levett, K.C., and *MacSwinney*, for the plaintiff. No one has a right to hold out another person as his partner in business; and upon the plaintiff shewing that the defendant is holding out *The Times* as his partners, he is entitled to an

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injunction: *Burchell* v. *Wilde*. (1) The defendant's method of advertising suggests that *The Times* is in partnership with him, or at any rate that he is carrying on a department of *The Times*: the natural inference to be drawn from these advertisements is that they were issued in connection with a newspaper, and that newspaper is *The Times*. The paper and type of *The Times* circular has been copied, also the signature, "The Manager," as were the green envelopes, which, besides having on them "The Times" and the Royal arms, are addressed to "The Times Cycle Department." By acts of this kind the defendant is committing a deliberate fraud on *The Times* and the public by inducing persons to believe that his business is carried on in connection with, or as a department of, *The Times*. The plaintiff makes no claim to the exclusive use of the words "Times" or "The Times" or "The Times system of payment," if fairly used; what the plaintiff does complain of is the way these words have been used by the defendant so as to mislead the public for his own purposes to the discredit and injury of the plaintiff. When the Court finds a series of coincidences all tending one way, the only conclusion to be drawn is that they are not coincidences, but acts designedly committed for the purpose of misleading the public, and thereby obtaining some unfair advantage. Evidence of intention to deceive is not necessary in a case like the present: *Saxlehner* v. *Apollinaris Co.* (2) If the Court is driven to the conclusion that what is done is done with the intention of deceiving the public, it may assume an occasional success, and consequent loss to the plaintiff: *Slazenger & Sons* v. *Feltham & Co.* (3) The defendant's mode of advertising, if not stopped at once by an interim injunction, may involve *The Times* in liability for selling worthless cycles, or expose it to litigation.

Norton, K.C., and *E. Ford*, for the defendant. The defendant is entitled to use a clock on his bicycles, or on any articles sold by him which are not literary productions. Even supposing the plaintiff had registered a clock as his trade-mark, he could not thereby acquire an exclusive right to it for all trades or

(1) [1900] 1 Ch. 551, 563. (2) [1897] 1 Ch. 893.
(3) (1889) 6 Rep. Pat. Cas. 531.

businesses: *Edwards* v. *Dennis* (1); *In re Hudson's Trade-marks* (2); *Hart* v. *Colley*. (3) [*Eno* v. *Dunn* (4) and *In re Australian Wine Importers* (5) were also referred to.] There is no connection between literary productions such as *The Times* or "Encyclopædia Britannica" and cycles; or between the newspaper trade and the cycle trade, and the plaintiff could not therefore have registered the clock as a trade-mark so as to interfere with the defendant's use of it on cycles: *In re John Batt & Co.'s Trade-marks* (6) and *John Batt & Co.* v. *Dunnett*. (7) There is no copyright in the word "Times" or "The Times" as applied to cycles; the plaintiff had no exclusive right to use old English or Gothic type, or the Royal arms, both being used by other newspapers, apart from their use for numerous other commercial undertakings; and if this is kept in mind in reading the advertisements and circulars there is nothing in them which, fairly construed, amounts to a representation that the defendant is holding himself out as being connected with *The Times*, or as a department of *The Times*. *The Times* system of payment by instalments is now a well-known system of purchase, and the defendant is entitled to call his system of payments by that name, and to call his cycles "Times Cycles." Though inquiries have been made at *The Times* office and of the defendant, there is no evidence that any one has been deceived, neither has the plaintiff proved any injury to *The Times* or any probability of injury; he has therefore made out no case for an injunction, much less an interim injunction. *Burchell* v. *Wilde* (8), relied on by the plaintiff, was a dispute between persons who had been partners, and has no application to a case like the present.

Levett, K.C., in reply. The defendant's name has never appeared in any of the advertisements or circulars: all applications are to be addressed to "The Manager"; the defendant is not a "manager" in the commonly accepted meaning of the word: the business is his own business, and to describe himself

(1) (1885) 30 Ch. D. 454.
(2) (1886) 32 Ch. D. 311.
(3) (1890) 44 Ch. D. 193.
(4) (1890) 15 App. Cas. 252.
(5) (1889) 41 Ch. D. 278.
(6) [1898] 2 Ch. 432.
(7) [1899] A. C. 428.
(8) [1900] 1 Ch. 551, 563.

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as "manager" is not an honest way of describing himself. All these acts are done with the intention of deceiving the public and obtaining some unfair advantage; they may cause the plaintiff an injury; if not stopped there is every probability that some damage will be caused: it is a fraud on the public which ought at once to be stopped by injunction.

Cur. adv. vult.

March 20. BYRNE J. As this case presents some elements of great importance and of some novelty, I should have preferred postponing my judgment until I could have put it into writing; but the case is one of a somewhat pressing nature, and it is of importance to the parties that they should have a speedy decision. The action is brought by the plaintiff on behalf of himself and the proprietors of *The Times* asking for an injunction, and application is now made for an interim injunction in the following terms: [His Lordship read the terms of the injunction, and continued:—]

Now, it is no part of the general business of a newspaper to carry on a cycle business, and this is not a question arising between rivals in trade. It appears to me that to entitle the plaintiffs to an interlocutory injunction they have to establish, first, that the defendant has represented the plaintiffs as his principals or partners, or, at least, as responsibly connected with his venture; and, secondly, that there is tangible probability of injury to the property of the plaintiffs in consequence of such representations. Mere annoyance is not enough, nor libel, not being trade libel; nor is a shadowy possibility of actions being brought enough. The case has to be considered apart from those cases turning on trade competition, infringement of rights, trade names, trade-mark, or the ordinary passing off equity. The plaintiffs have, I think, founded their notice of motion on the only ground upon which, if at all, they are entitled to succeed upon the present application. Now the short history of the case is this. [Having stating the facts as above, his Lordship continued:—]

Beyond the letters to the manager of *The Times* (in neither

of which can I infer that the particular persons writing were themselves actually deceived, although put upon inquiry) there is no direct evidence that any one has yet been actually deceived into thinking that the cycles advertised for sale are the cycles of *The Times* newspaper. The defendant himself says that amongst his callers only three persons had asked him whether he had any connection with *The Times* newspaper. That, of course, may be read and considered in two ways. It may be that so many people had been satisfied that it was a department of *The Times*, and that it was in connection with *The Times*, that they did not even think it worth asking, or it may be they thought it was so unlikely *The Times* would be connected with it that they did not ask. At any rate, it leaves it quite open to this observation, that three persons thought it probable that *The Times* had something to do with it, and by letter two persons made inquiries; and it is also quite open to this, that persons may have been deceived into thinking that the sales were by or in connection with *The Times* newspaper. There are one or two other matters I ought to refer to. One is that on application to the defendant's office—"The Times" cycle office—the person inquiring was handed certain documents with "Times" in the same type, between inverted commas, then the Royal arms, and then "Cycles" on the other side, "With Dunlop tyres." Inside there were two advertisement books, one being simply an advertisement of the Dunlop tyres, and the other being an advertisement in connection with the defendant's cycles that speaks of the cycle as "'The Times'" (in inverted commas) "Cycle," and refers to the *Daily Express* system and to *The Times* system. Besides this, the defendant uses and gives away a little book, which is headed "'The Times'" (in ordinary type capitals between inverted commas) "Cycle, manufactured at the Birmingham Ordnance Works." Then, a little lower down, "Cycle offices and show-rooms, 59 and 60, Chancery Lane, Holborn, London, W.C." And then a puff beginning, "Millions of cycles." On page 3 of that I come across, in large letters at the head of it, "'The Times'" (in inverted commas) "Cycle"—not "Times," but "The Times"—"made by the Birmingham Ordnance and

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Engineering Company, is so called because it is, per se, a bicycle of the latest design, of the highest quality, and of faultless workmanship, and is, in fact, right up to the times, and supplied to the public, as no other cycles are, on *The Times* system of monthly payments. They can be seen (where orders can be booked) at 59 and 60, Chancery Lane, London, W.C." Then further on, after a good deal of puff, seven substantial replies to questions are given. "Who are the actual manufacturers? Answer.—The Birmingham Ordnance and Engineering Company." Then later on again, "Anticipating the sale of many thousands of 'The Times' cycles, we have made large contracts for tires and tubing, and with big Sheffield, Coventry, and Birmingham houses for the supply of the raw material. All business will come through London in the first place." From beginning to end, although they mention the names of the makers who supply the tyres, and the names of the manufacturers, there is no reference to the name of the defendant or to any other identification of the place where they are sold than the name of "The Times Cycle," and the address "59 and 60, Chancery Lane, Holborn, London, W.C." Taking all those matters together, and having regard to the circulars, the advertisements, and the general conduct of the business carried on by the defendant in reference to these cycles, I have come to the conclusion on the present materials that he has intended to induce people to think either that the proprietors of *The Times* are the vendors, for whom the person in Chancery Lane, whoever he may be, is the manager of the department, or that they are partners, or in some way pecuniarily and with responsibility connected with the sale of these articles. Now, as I have said, this not being a case as between rival traders, and not being a case turning upon contract, it is not enough to shew a probability of deception of the public for the purpose of this interlocutory injunction, or to shew that persons may be deceived into thinking that these cycles are the manufacture or the property of *The Times* newspaper: that alone would not be sufficient for the present purpose. I think you must shew some probable risk of injury by what has been done. Now, how do the authorities

stand in reference to this matter? I think one of the earliest I need refer to is *Routh* v. *Webster*. (1) In that case a joint stock company called "The Economic Conveyance Company" was established to carry passengers by steamboat and omnibus at the average rate of 1*d*. a mile. The defendants, the provisional directors, had published prospectuses, in which the name of the plaintiff was used, without his authority, as a trustee for the company. They also paid moneys into the bankers of the company to the plaintiff's account as trustee. The plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the directors and moved for an injunction to restrain them from using his name in connection with the company. It was argued that the defendants ought to be prevented from using the plaintiff's name in this unauthorized way, as it might subject him to liabilities and litigation from the shareholders and others; and that the application was necessary, for otherwise the plaintiff might be held liable on the ground of his acquiescing in this use of his name. The Master of the Rolls, Lord Langdale, said (2): "The sort of opposition made to the application to prevent the unauthorized use of the plaintiff's name furnishes a specimen of the anxiety of the defendants to avoid unnecessary litigation. I think that the plaintiff is entitled to the injunction. I have no doubt the plaintiff never did consent to be a trustee. The defendant Webster might have thought he did: if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee: his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can." And then, after referring to some negotiations for an indemnity which was not given, and the facts, he continues: "I am of opinion that the plaintiff is entitled to the injunction; and, if it subjects the defendants

(1) 10 Beav. 561.

(2) 10 Beav. 562, 563.

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to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not. Is not the plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the defendants, that they do not intend to repeat their misrepresentations; but I think the plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this Court." Of course there are points of difference between that case and the present; but the injunction was granted on the footing that the plaintiff was exposed to some risk and liability by the unauthorized use of his name. That case was referred to with approval by Lord Cairns in *Prudential Assurance Co.* v. *Knott* (1), an action to restrain a trade libel, in which the Court held there was no jurisdiction to restrain the publication of a libel as such, even if it was injurious to property; and Lord Cairns, after referring to the case of *Dixon* v. *Holden* (2), says (1): "It"—that is, *Dixon* v. *Holden* (2)—"professes to proceed mainly upon a case of *Routh* v. *Webster* (3), because I observe that the Vice-Chancellor says: 'The case of *Routh* v. *Webster* (3) is an authority going the whole length of what is asked here.'" After stating the facts as I have already given them, Lord Cairns continues: "That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the plaintiff might have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name." I may mention in passing a case of *Clark* v. *Freeman* (4), where the Court declined to

(1) (1875) L. R. 10 Ch. 142, 146.
(2) (1869) L. R. 7 Eq. 488.
(3) 10 Beav. 561.
(4) (1848) 11 Beav. 112.

interfere to restrain the sale by the defendant of a quack medicine under the name of "Sir J. Clarke's Consumption Pills," on the ground that it was libel if it was anything, and that there was no injury to the property which was sold. That decision has been frequently the subject of observation by various judges. Lord Cairns, in *Maxwell* v. *Hogg* (1), said that it might have been decided in favour of the plaintiff on the ground that he had a property in his own name. And Lord Selborne, in *In re Rivière's Trade-mark* (2), says that *Clark* v. *Freeman* (3) had seldom been cited but to be disapproved; and Kekewich J., in a recent case, having in view all that has been said about it, has declined to follow it. The principle is clear enough: the Court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then, if I rightly understand the law of this Court, an injunction is the proper remedy. I will refer to one other case which was cited to me in argument, namely, *Burchell* v. *Wilde*. (4) In that case the plaintiff and defendant had been in partnership, and there was a dispute as to the right to use the old firm name; and Lindley M.R. says (5): "Apart from some express stipulation, a man has no right to hold out his late partner, or indeed any one else, as his partner in business, and, if it could be shewn that the defendants were holding out the plaintiffs as their partners, I should think (subject to what the defendants, whom we have not heard, might say) that the plaintiffs would be entitled to an injunction." At p. 564 Lindley M.R. says: "As to the goodwill of the business and the use of the firm name, apart from any liability to which they may be exposing the plaintiffs, the defendants are in the right, and to my mind that liability is so shadowy that the appeal ought to be dismissed." So that, in considering what kind of liability will justify interference, I think the Court will be careful to see that

(1) (1867) L. R. 2 Ch. 307, 311.
(2) (1884) 26 Ch. D. 48, 53.
(3) 11 Beav. 112.
(4) [1900] 1 Ch. 551.
(5) [1900] 1 Ch. 563.

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the suggested liability was not something merely visionary or shadowy. The Partnership Act of 1890, s. 14, sub-s. 1, provides: "Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made." This really is only a carrying out of a branch of the law turning upon estoppel by conduct. If a man allows his name to be held out to the public as being the person responsible for the transaction in question, he may be held liable in consequence of this holding out, or in consequence of his conduct, although he may not have originally authorized the act because he has not taken steps which he should take to stop the unauthorized use of his name. I apprehend that a similar principle would apply in the case of allowing a name to be held out by a man representing himself as agent or as principal in a particular transaction, all forming part, as I have said, of the general principle of estoppel by acts. Now in the present case the defence is chiefly founded on this. "I," said the defendant, "have done nothing that the law has not entitled me to do"; and, taking the single acts and matters complained of, he says, to begin with: "I am entitled to call my cycle 'Times Cycle' or 'The Times Cycle.' I am entitled to adopt for a mark upon it a similar clock to the clock used by *The Times* newspaper. I am entitled to have the hands of the clock pointing to the same hour." And he is perfectly right in what he says. Again, he says: "I am perfectly entitled to advertise my cycles as 'The Times Cycles' if that is the proper name of the cycle. I am entitled to advertise that payment is according to *The Times* system (meaning *The Times* newspaper system), the system inaugurated by the proprietors of *The Times*." So he is, and, thus taking each item one by one, he says: "I am entitled to do this, that, and the other." But the real question I have to consider is whether, by what he has

done, he has in fact held out the proprietors of *The Times* as either being principals, or responsibly connected with him, or partners with him in the sale of these cycles. I have come to the conclusion that he has; and I have further come to the conclusion that there was such a reasonable probability of *The Times* being exposed to litigation, and possibly of being made responsible had they not taken the steps to disconnect their names from the advertisements and circulars that are issued by the defendant, that, although I have hesitated for some time as to whether I ought to do this upon an interlocutory motion, now that the action will come on so quickly for trial when the matter might finally be disposed of upon further evidence still, I think that it is so clear upon the documents and the acts that I have mentioned that this case really falls within the line of authorities commencing with that before Lord Langdale which I cited, that I propose to grant an injunction now in proper form. I may make one other observation. Since the writ was issued the defendant has put out another advertisement in the *Daily Mail*, in which he does state fairly conspicuously, though not so conspicuously as I should have wished, that his goods had no connection with any newspaper whatever. That, in my judgment, is not sufficient under the circumstances. I think I ought to grant the injunction in the following form: To restrain the defendant, his managers, servants, and agents, until the trial or further order, from representing that the cycles offered for him by sale are in fact offered for sale by the proprietors of *The Times* newspaper, or representing that he is carrying on business as a department of, or in connection with, *The Times* newspaper, or in any way holding out *The Times* newspaper, or the proprietors thereof, to be the owners of his business. The costs will be costs in the action. I think it is only fair, however, that the defendant should have a little time to put things in order.

Solicitors: *Soames, Edwardes & Jones; Bate & Co.*

W. C. D.

BYRNE J.

1902

Jan. 29; *Feb.* 4, 5; *May* 6.

In re DOUGLAS AND POWELL'S CONTRACT.

[1901 D. 1919.]

Vendor and Purchaser—Will—Construction—Trust for Sale—Reconversion—Election—Leaseholds—Annuities—Appropriation—Purchase by Trustee for Sale.

On a contract for sale of leaseholds the purchaser objected that the vendor at the time when he bought the property was himself a trustee for sale. Sir R. Macfarlane by his will gave all his real and leasehold estate, including the property in question, to his son Robert and J. Cockerell upon trust for sale, and to stand possessed of the proceeds upon trust to appropriate investments to answer annuities for his wife, his daughter Magdalen, and his son Henry. The testator gave his residue to his son Robert, and died in 1843. Henry was at this time incapable of managing his own affairs, and so continued down to the time of his death. In 1843 Lady Macfarlane was appointed an additional trustee, and the property was vested in Robert, Cockerell, and her, subject to the provisions of the will. In 1847 a new trustee was appointed in place of Cockerell by deeds which recited that the property subject to the trusts included the leaseholds, and conveyed them specifically to the new trustees upon the trusts of the will. Robert executed a power of attorney in favour of Lady Macfarlane, and she let the property on several occasions. Robert died in October, 1849, leaving all his property equally to Lady Macfarlane, Magdalen, and Henry; and in 1850 Lady Macfarlane was appointed administratrix of his estate with the will annexed. In 1853 she became the sole trustee; and in 1859 and 1866 she let the leaseholds for terms of years. She died in 1873, leaving all her property to Magdalen and appointing her sole executrix. Magdalen died in 1877, leaving her property to Sir C. Douglas, and appointing him and another executors. All the property remaining subject to the trusts of the will of Sir R. Macfarlane thus became vested in Sir C. Douglas, and he paid into court to the account of Henry certain funds on an affidavit which stated that after the death of Sir R. Macfarlane his trustees got in all his real and personal estate, and appropriated 40,000*l.* Bank Annuities and the leaseholds in question to answer the annuities, and transferred the residue to Robert. In 1878 Henry was found of unsound mind by inquisition, and the master reported that the leaseholds in question belonged half to Henry and half to Sir C. Douglas absolutely, subject to Henry's annuity of 500*l.* In 1887 Sir C. Douglas died, and his will was proved by G. C. Douglas, one of his executors. In 1888 Henry (acting by his committee) and G. C. Douglas, by a deed which recited that they were absolutely entitled in moieties to the property, and that the master had approved of the deed, let the property for twenty-one years. Henry died in 1892, and letters of administration to his estate were granted to Gertrude Begbie, one of his

next of kin. By a deed of May 19, 1893, which recited that G. C. Douglas was surviving trustee of the will of Sir R. Macfarlane, G. C. Douglas, as trustee, at the request of Gertrude Begbie, and in consideration of 3000*l.* paid by G. C. Douglas to her, and being himself entitled as beneficial owner to the other half of the property, assigned the leaseholds to H. P. Leach. By an indenture of May 20, 1893, H. P. Leach, as trustee and at the request of G. C. Douglas, assigned the premises to him. On September 19, 1901, G. C. Douglas agreed to sell the property to Powell for 12,200*l.*, and the purchaser took the objection that in 1893 G. C. Douglas was a trustee for sale of the property, and could not purchase the half of it which was then conveyed to him:—

Held, that, if any appropriation had taken place, it was an appropriation of unauthorized securities, and was not effectual to destroy the trust for sale; that until Henry was found a lunatic there could be no election by the beneficiaries; that there had been no election to take in specie by the Court on behalf of the lunatic; that it was not proved that there had been an election by all the persons interested; that the trust for sale did not come to an end when the annuities ceased, was not void for perpetuity, and was operative in 1893; and that the title ought not to be forced on the purchaser.

THE facts as stated by Byrne J. were as follows:—This is a summons taken out under the Vendor and Purchaser Act by a purchaser, asking for a declaration that a good title has not been shewn and for return of deposit.

The only questions for determination upon the present application are whether or not Douglas, the vendor, was, at the date of a purchase by him of a beneficial moiety in the property, a trustee for sale, and as such incapable of purchasing; and whether or not the title is such that it ought to be forced on a purchaser, having regard to the state of circumstances in reference to the first point; other questions being left for determination (if at all) in separate proceedings.

The state of facts out of which the matter arises is complicated, and it is necessary to trace the title proposed to be made by the vendor in some detail. The property, the subject-matter of the contract, is leasehold, being No. 1, Great Cumberland Place (formerly No. 19), and some stables held with them, the term being one which will expire in 1928. This property belonged to Sir Robert Macfarlane at the time of his death, and passed under his will. Sir R. Macfarlane, by his will dated September 15, 1836, gave all his real and leasehold estate and residuary personalty to his son Robert Macfarlane

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and John Cockerell, their heirs, executors, administrators, and assigns respectively, upon trust that they and the survivor of them, and the heirs, executors, administrators, and assigns respectively of such survivor, should, with all convenient speed after his decease, call in and convert his said estate, or such part thereof as should not consist of money, and should absolutely sell and dispose of his said freehold and leasehold estates, as therein mentioned, and declared that the trustees named, their heirs, executors, administrators, and assigns respectively, should stand and be possessed of and interested in all the money to arise from the sale or sales thereinbefore directed to be made of his real and leasehold estates or to arise from his personalty directed to be converted, and of and in the money of or to which he should be possessed or entitled at the time of his decease, upon trust, after payment of costs, debts, funeral and testamentary expenses, to invest the residue in their or his names or name in some or one of the parliamentary stocks or public funds or other Government securities in Great Britain, or upon real securities in England, and to appropriate investments to answer an annuity of 1000*l.* a year to his wife, and until such appropriation the said annuity to be discharged out of his general personal estate, and to appropriate investments to produce the clear yearly sum of 250*l.*, and with or out of the dividends and annual produce of such appropriated funds, or failing the same then with or out of the principal fund, pay or cause to be paid to his son Henry Macfarlane or his assigns during his life an annuity of 250*l.*, and until such appropriation the said annuity to be discharged out of his general personal estate. And the testator also directed that his trustees or trustee for the time being should from and after the decease of his wife Lady Macfarlane (in case his son Henry should be then living) appropriate and set apart such and so much of the said stocks, funds, or securities as would at the time of such appropriation yield or produce from the dividends, interest, or annual produce the further clear yearly sum of 250*l.*, and should out of the dividends, interest, and annual produce of such appropriated funds, or failing the same then with or out of the principal fund pay or cause to be paid unto the said

Henry Macfarlane or his assigns during his life a further annuity of 250*l.* And the testator provided and declared that, in case the said Henry Macfarlane should require moneys for purchasing his advancement in the army, it should be lawful for the trustees or trustee for the time being, at the request in writing of the said Henry Macfarlane, to advance him the sum of 3000*l.* for that purpose in lieu and extinction from thenceforth of the said last annuity of 250*l.* There were similar provisions (except as to the advance of 3000*l.*) for providing annuities of 250*l.* and 250*l.* for his daughter Magdalen Gertrude Louisa Macfarlane, and it was provided that, in the event of the marriage of his daughter with consent, the trustees or trustee might advance 6000*l.* in lieu and extinction of such annuities, the 6000*l.* to be settled as therein mentioned. And as to, for, and concerning all his real and personal estates whatsoever and wheresoever, and all moneys arising therefrom not thereby absolutely bequeathed and subject or chargeable as therein mentioned, the testator thereby gave, devised, and bequeathed the same and every part thereof, subject and chargeable as aforesaid, unto his said son Robert Macfarlane, his heirs, executors, and administrators, according to the nature and quality thereof, and he thereby directed and declared that his trustees or trustee for the time being should from time to time convey, pay, assign, and make over the same accordingly.

The testator died in June, 1843, and his will was proved by Robert Macfarlane, the son, on July 10, 1843.

Henry Macfarlane was at the date of his father's death incapable of managing his affairs, and so continued down to the time of his death.

By indentures dated August 26 and 27, 1843, respectively, Lady Macfarlane was duly appointed an additional trustee of the will of Sir Robert Macfarlane the elder, and all the trust property, including specifically the leasehold premises, the subject-matter of the contract in the present case, was duly vested in the said R. Macfarlane, J. Cockerell, and Lady Macfarlane, their executors, administrators, and assigns, upon the trusts and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, directions, and

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declarations expressed, declared, given, and contained of and concerning the same in and by the said will, or such of the same as were then subsisting or capable of taking effect.

By a power of attorney dated September 4, 1843, after reciting that the said R. Macfarlane was under the will of his father entitled (inter alia) to the leasehold property in question or part of it, he appointed his mother, Lady Macfarlane, his attorney for the purpose of letting it; and on September 5, 1843, the said R. Macfarlane appears to have entered into an agreement to let the same leasehold premises furnished for a year, with an option to the tenant to keep it on for another three years.

Between the expiration of this tenancy and October 22, 1847, there appear to have been three short lettings for one year, one year, and five months of the same premises by Lady Macfarlane, acting under the power of attorney.

By indentures dated respectively October 22 and 23, 1847, the earlier of which contained a recital that the property of the said Sir Robert Macfarlane, subject to the trusts of the said will, consisted of (inter alia) the leasehold messuages or tenements thereinafter assigned, Earl Beauchamp was duly appointed a trustee of the said will in place of J. Cockerell, who retired, jointly with R. Macfarlane and Lady Macfarlane, and the trust property, including specifically the leasehold premises in question, was vested in the continuing and new trustees, their executors, administrators, and assigns, upon the trusts nevertheless and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, directions, and declarations expressly declared, given, and contained of and concerning the same premises in and by the said will, or such and so many of the same as were then subsisting and capable of taking effect.

On the same October 22, 1847, R. Macfarlane executed a general power of attorney in favour of Lady Macfarlane; and on March 8, 1848, she let the leasehold premises in question to Earl Lovelace furnished for two years, with an option for the tenant to continue for another two years.

Robert Macfarlane the younger died on October 19, 1849,

having by his will dated September 6, 1843, given and bequeathed unto his mother Lady Macfarlane, his sister Magdalen Gertrude Louisa Macfarlane, and his brother Henry Macfarlane, for their absolute use and benefit, equally to be divided between them share and share alike, all his real and personal property of what nature or kind soever; and on February 27, 1850, administration with the will annexed was granted to Lady Macfarlane.

Lady Macfarlane as such administratrix took upon herself the management of the estate of the said Robert Macfarlane, and sold considerable portions of it, and applied the proceeds of such sales to her own use. The amount so applied considerably exceeded the share to which she was beneficially entitled under his will, and she was at her death indebted to her children, Henry Macfarlane and Magdalen Gertrude Louisa Macfarlane, to the extent of such excess. The whole of the balance of the estate of Robert Macfarlane then belonged beneficially to the said Henry and Magdalen Macfarlane in equal shares as tenants in common.

Earl Beauchamp died on January 21, 1853, and upon his death Lady Macfarlane became the sole trustee of the will of Sir Robert Macfarlane.

From the time of the death of Robert Macfarlane in 1849 there were first some short lettings of the leaseholds in question, and on May 2, 1859, a lease for twenty-one years determinable by the tenant at seven or fourteen years, and on November 22, 1866, a lease for twenty-one years of the same premises. All these lettings were by Lady Macfarlane alone.

It will be noticed that she had no right to let as administratrix of R. Macfarlane if, as is suggested, there had been a valid appropriation of the property under the trusts of the will, and her only legal title which would give colour to her leasing would be as sole trustee of the will of Sir R. Macfarlane, whether there had been an appropriation or not.

Lady Macfarlane died on February 7, 1873, having by her will dated February 8, 1844, made her daughter, Magdalen Gertrude Louisa Macfarlane, her sole beneficial devisee and legatee, and appointed her sole executrix thereof.

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Magdalen G. L. Macfarlane proved the will, got in her mother's property, consisting of personalty only, paid the funeral and testamentary expenses, and the debts, except the debts due to her and Henry Macfarlane, and retained the residue in her hands in part payment of the debt so due to her as aforesaid. The amount so retained by her was wholly insufficient to answer that debt.

No administration to the estate of R. Macfarlane was ever taken out by M. G. L. Macfarlane, and all that she did in relation to her brother's estate must have been as executrix de son tort.

M. G. L. Macfarlane died on October 19, 1877, having by her last will dated December 1, 1875, bequeathed her residue, real and personal, to Sir Charles Douglas, and appointed him and another executors.

The will of M. G. L. Macfarlane, with a codicil immaterial to be stated, was proved by Sir Charles Douglas alone on November 1, 1877.

The said Sir Charles Douglas, in whom alone all the property remaining subject to the trusts of the will of Sir Robert Macfarlane, as well as all the estate of the said M. G. L. Macfarlane, had then become vested, transferred into court, under the provisions of the Trustee Relief Act, to the credit of "The account of Henry Macfarlane," certain sums of New 3*l.* per cent. Annuities, Consolidated Bank Annuities, and cash upon an affidavit sworn by him on December 18, 1877 (from which such of the facts before mentioned as do not appear from deeds and documents are taken), and in such affidavit it is stated by Sir Charles Douglas (inter alia) that after the death of the said Sir Robert Macfarlane (no other date is given) the trustees of his will got in and took possession of all his real and personal estate, and after paying his debts, funeral and testamentary expenses, and appropriating 40,000*l.* 3*l.* 10*s.* per cent. Reduced Bank Annuities (afterwards converted into the like sum of New 3*l.* per cent. Annuities), and the two leasehold houses, No. 35, Great Cumberland Place, and No. 1, Great Cumberland Street, respectively, and the stables and coach-houses held therewith respectively, as a fund for answering the said annui-

ties (meaning the annuities by the will bequeathed in favour of Lady Macfarlane, M. G. L. Macfarlane, and Henry Macfarlane), which fund was thereinafter referred to as "the appropriated fund," paid and transferred to the said Robert Macfarlane all the residue of the testator's estate, with the exception of certain chattels in which Lady Macfarlane had under the will a life interest.

It is also stated that the income of "the appropriated fund" was, after deducting the annuity of 250*l.* payable to M. G. L. Macfarlane, from time to time during the life of Lady Macfarlane paid to her, and that she maintained Henry Macfarlane, but did not pay to or render any account to him of the annuity to which he was entitled, but it was believed that she paid on his behalf sums which about equalled or exceeded what was payable in respect of his annuity.

It is also stated that on the death of Lady Macfarlane the unsold part of "the appropriated fund" consisted of the following particulars, namely, 27,120*l.* 9*s.* 8*d.* New 3*l.* per cent. Consols, and of the leasehold houses in Great Cumberland Place and Great Cumberland Street, and of the stables and coach-houses thereto respectively belonging, and that the outstanding estate of Robert Macfarlane consisted of a sum of 7000*l.* Bristol and Exeter Railway Company's Debenture Stock standing in the name of Lady Macfarlane, of a leasehold house, No. 11, Chesham Street, Belgrave Square, and of certain chattels.

It is also stated that the said M. G. L. Macfarlane, shortly after her mother's death, under the advice of counsel, divided the said sums of 27,120*l.* 9*s.* 8*d.* New 3*l.* per cent. Consols and 7000*l.* Bristol and Exeter Railway Company's Debenture Stock between Henry Macfarlane and herself, by transferring a moiety into her own name for her own use and benefit, and by allowing the sum of 13,560*l.* 4*s.* 10*d.* New 3*l.* per cent. Consols and 3500*l.* Bristol and Exeter Railway Company's Debenture Stock (being the other moiety thereof respectively) to remain for the benefit of the said Henry Macfarlane in the names in which the said sums of 27,120*l.* 9*s.* 8*d.* New Consols and 7000*l.* Bristol and Exeter Railway Company's Debenture Stock were

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respectively standing at her mother's death (that is, in the names of Robert Macfarlane, Lady Macfarlane, and Earl Beauchamp, all deceased).

It is further stated that after the death of Lady Macfarlane M. G. L. Macfarlane received on account of Henry Macfarlane all the income which as well before as after such division as aforesaid and during her life accrued in respect of the last-mentioned sums of 13,560*l.* 4*s.* 10*d.* New 3*l.* per cent. Consols and 3500*l.* debenture stock, and also his moiety of the net rents and profits from time to time due of the leasehold premises in Great Cumberland Place and Great Cumberland Street, and of the stables and coach-houses thereto respectively belonging, and of 11, Chesham Street, and, after payment of outgoings and expenses payable in respect of the same premises and of certain sums which M. G. L. Macfarlane from time to time applied for his maintenance, she from time to time invested the residue of such income and the annual produce of such investments.

On April 6, 1878, the said Henry Macfarlane was duly found of unsound mind by inquisition.

By his first general report dated July 31, 1878, the master found that the fortune of the said Henry Macfarlane consisted of (inter alia) "an absolute interest" (subject as thereinafter mentioned) "in one undivided half part or share of the several leasehold hereditaments specified in the 2nd schedule thereto." The said 2nd schedule (so far as material) is as follows:—

"The 2nd schedule referred to in the foregoing report.

"Containing the particulars of leasehold houses and premises, a moiety of which belongs absolutely to the said Henry Macfarlane, and the other moiety to the said Sir Charles Douglas, subject as to the entirety of the leasehold premises first and secondly thereinafter mentioned to an annuity of 500*l.* payable to the said Henry Macfarlane during his life" (inter alia), "No. 1. A leasehold messuage and premises No. 1, Great Cumberland Place (formerly No. 19, Great Cumberland Street), Hyde Park, with coach-house and stable in Bryanston Mews, held for a term of years expiring at Michaelmas, 1928, the entirety of the premises being sublet on lease to the Countess

of Craven for a term expiring on December 25, 1887, at the yearly rent of 658*l.* 7*s.* 6*d.*"

This report was duly confirmed on August 7, 1878, and the custody of the estate of the said Henry Macfarlane was committed to Sir Charles Douglas.

Sir Charles Douglas died on February 21, 1887, having by his last will appointed the Marquis of Ripon and his son Greville Charles Douglas executors.

The will of Sir C. Douglas was duly proved on March 22, 1887, by the said Greville Charles Douglas alone.

The custody of the estate of the said Henry Macfarlane was subsequently committed to Colonel Johnstone.

By indenture of underlease dated February 20, 1888, and made between Henry Macfarlane (described as a person of unsound mind so found by inquisition), acting by J. J. Johnstone, the duly appointed committee of his estate, and the said Greville Charles Douglas of the one part, and the Countess of Craven of the other part, after reciting that the said H. Macfarlane was absolutely entitled to a moiety of a leasehold interest in the messuage and premises thereinafter described and intended to be thereby demised, and that the said G. C. Douglas was absolutely entitled to the other moiety, and that by an order dated January 12, 1888, and made in the matter of the lunacy, it was, amongst other things, directed that that deed should be granted, that the master had settled and approved the deed as a proper lease to be granted to the Countess of Craven of the said messuage and hereditaments, and in testimony of his approval had signed his name in the margin of the first and two following skins of that deed, and his name and allowance in the margin of the fourth and last skin thereof, it was witnessed that they the said H. Macfarlane (acting as aforesaid) and G. C. Douglas, according to their respective estates and interests, demised No. 1, Great Cumberlend Place and 7, Bryanston Mews, to the Countess of Craven for a term of twenty-one years, and the deed contained the usual covenants by the Countess of Craven with the said H. Macfarlane and G. C. Douglas with separate covenants as to their respective interests.

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Henry Macfarlane died on January 27, 1892, a bachelor and intestate, and letters of administration to his personal estate and effects were duly granted out of the Principal Registry of the Probate Division on July 7, 1892, to Gertrude Begbie, one of the next of kin.

By an order dated August 4, 1892, made in the matter of the said lunacy, it was ordered (inter alia) that the passing of a final account by the said J. J. Johnstone should be dispensed with, and his security as committee of the estate be discharged.

By deed dated May 19, 1893, and made between the said G. C. Douglas of the first part, the said Gertrude Begbie of the second part, the said G. C. Douglas of the third part, and H. P. Leach of the fourth part, after reciting (inter alia) the will of Sir Robert Macfarlane that the said G. C. Douglas was, in the events that had happened, the surviving trustee of the said will, but that no sale of the leasehold premises bequeathed by the said will had ever been made, and that the beneficial interest in the said leasehold premises and in the proceeds of sale thereof, if sold, became vested in the said G. C. Douglas and H. Macfarlane in equal shares as tenants in common, it was witnessed that, in pursuance of the said agreement and in consideration of 3000*l.* paid by the said G. C. Douglas to the said G. Begbie, he, the said G. C. Douglas, as trustee at the request and directions (thereby testified) of the said G. Begbie as legal personal representative of H. Macfarlane as to one equal undivided moiety of the said premises, and being himself entitled as beneficial owner to the other equal undivided moiety of the same premises, thereby assigned the leasehold premises in question to the said H. P. Leach, his executors, administrators, and assigns, for the residue of the term subject to the indenture of underlease of February 20, 1888.

By indenture dated May 20, 1893, made between the said H. P. Leach of the one part, and the said G. C. Douglas of the other part, it was witnessed that the said H. P. Leach as trustee, and at the request of the said G. C. Douglas, thereby assigned the same leasehold premises to the said G. C. Douglas, his executors, administrators, and assigns, subject as aforesaid.

Subsequently the premises have been mortgaged and the underlease has been released so as to merge.

On September 19, 1901, a contract for sale of the entirety of the premises No. 1, Great Cumberland Place, and the stables held therewith, was entered into with the present applicant by Greville Charles Douglas for the sum of 12,200*l.*, an abstract, requisitions, and answers have been delivered, and the purchaser declines to complete upon the ground that the vendor was at the date of his purchase in 1893 trustee for sale of the entirety of the property, one moiety of which he purchased, and that the transaction is therefore voidable by Mrs. Begbie, or any other of the next of kin of Henry Macfarlane entitled equitably with her. It is pointed out that the present sale is for a price representing more than double that paid by the vendor eight years ago, although the length of the term to run has diminished.

It is insisted on behalf of the vendor that a good title is shewn, that he was a bare trustee of the property when he purchased, and the vendor cannot or is unable to procure the concurrence of Mrs. Begbie and the other next of kin of Henry Macfarlane.

Mulligan, K.C., and *Manning*, for the purchaser. On the facts of this case no election was ever made to take this leasehold property in specie, though there may have been an attempt to release the trustees from the trust for sale. One of a number of persons interested in an estate cannot elect: in order to effect an election the parties concurring must be absolutely interested; if they have only a partial or limited interest it will be ineffectual: *Sisson* v. *Giles*. (1) Robert during his life never became absolutely and indefeasibly entitled: no one could become absolutely entitled until the death of the lunatic because of his incapacity to elect; the trust for sale was, therefore, subsisting at the time the purchase of the moiety was made by the trustee; in effect the trustee purchased from himself, which he had no right to do. The onus is on the trustee to shew that the relationship of cestui

(1) (1863) 3 D. J. & S. 614.

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que trust and trustee was at an end before the purchase was made. The title shewn, being in effect that of a purchase from himself as trustee for sale, will not be forced upon a purchaser: *Williams* v. *Scott* (1); *Ex parte Lacey*. (2)

The purchaser's objection, therefore, is well founded. But in any case, even if the vendor can prove that all necessary information was given as to the value, and that all the beneficiaries knew and approved of the sale, the title is too doubtful to be forced on any purchaser.

Rowden, K.C., Christopher James, and *Whinney*, for the vendor. The trust for sale created by the will of Sir R. Macfarlane had ceased to exist before 1893. For fifty years there had been no suggestion of a sale. The facts that it was a leasehold, and that the annuity was given to Henry Macfarlane, who was a lunatic and could not elect, are not obstacles to election; and, further, we submit that the Court has elected on behalf of the lunatic. The trust for sale was created in order to provide for the annuities, and it ceased when they came to an end: *In re Hotchkys* (3); otherwise it might have been void under the rule against perpetuities: *Goodier* v. *Edmunds*. (4) The facts shew that the parties had elected to keep the property unconverted and appropriate it to meet the annuities, and they had power to do so, although there were annuities charged upon it: *Griesbach* v. *Fremantle* (5); *Mutlow* v. *Bigg*. (6) Letting is important evidence of election to take in specie: *In re Gordon*. (7) A person who has only a defeasible title can elect: *Meek* v. *Devenish* (8); *In re Davidson*. (9) The decision in *Sisson* v. *Giles* (10) turned upon the circumstance that one of the persons required to sign a deed was a married woman who could not deal with the property. In *In re Lewis* (11) Pearson J. held upon the particular facts of the case that there had been no election, but he would otherwise have followed *In re Gordon* (7); *Potter* v.

(1) [1900] A. C. 499.
(2) (1802) 6 Ves. 625; 6 R. R. 9.
(3) (1886) 32 Ch. D. 408.
(4) [1893] 3 Ch. 455.
(5) (1853) 17 Beav. 314.
(6) (1875) 1 Ch. D. 385.
(7) (1877) 6 Ch. D. 531.
(8) (1877) 6 Ch. D. 566.
(9) (1879) 11 Ch. D. 341.
(10) 3 D. J. & S. 614.
(11) (1885) 30 Ch. D. 654.

Dudeney (1) is in our favour. It is not necessary to shew a particular point of time when election was made. It is sufficient to prove that it took place before a certain time. Here the inference from the facts is clear that election has taken place, and the Court will force the title on the purchaser: *Mogridge* v. *Clapp*. (2) The difference between doubts of law and doubts of fact is shewn by *In re Marshall and Salt's Contract*. (3) The doubt here is purely on a question of fact, and does not come within the later cases: *In re Trustees of Hollis' Hospital and Hague's Contract* (4) and *In re Thackwray and Young's Contract*. (5)

Mulligan, K.C., in reply. Under the will there is a paramount trust for sale, and the trustees were not authorized to retain these leaseholds. They were to set certain property apart, and the legatee was entitled to call for a transfer of the balance. This was actually done. The property was only appropriated subject to the trust for sale. The words of the trust are imperative, whereas in *In re Hotchkys* (6) the trustees had a discretionary power. It is said that the trust came to an end at the expiration of lives in being, namely, when the last annuitant died; but there is no foundation for that contention. A trust for sale is not within this rule, which applies only to powers: *In re Tweedie and Miles* (7), following *Biggs* v. *Peacock*. (8)

There has been no election. There is no case in the books in which the doctrine of election has been applied to leaseholds. The nature of the property makes it impossible. Leaseholds vest in the executor, and he can sell them to pay debts. Again, a leasehold is a terminable and a burdensome security. The Court will not without strict evidence assume that the legatee elected to become subject to the covenants of the lease. In 1843 Robert Macfarlane acted as executor, not as legatee.

[BYRNE J. Not after the appointment of trustees.]

He assented to what was done.

(1) (1887) 56 L. T. 395.
(2) [1892] 3 Ch. 382.
(3) [1900] 2 Ch. 202.
(4) [1899] 2 Ch. 540.
(5) (1888) 40 Ch. D. 34.
(6) 32 Ch. D. 408.
(7) (1884) 27 Ch. D. 315.
(8) (1882) 22 Ch. D. 284.

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But even if this had been real estate there would have been no election. The house was divided between three persons. When Lady Macfarlane took out administration to her son in 1850, the house vested in her as administratrix and again became liable to be sold. After the death of Robert in 1849 there was no one capable of making an election. In order to effect an election the assent of all the persons interested in the estate is essential: *In re Davidson.* (1) *Griesbach* v. *Fremantle* (2), which was cited to shew that the fact that there is an annuity which has to be raised out of the property does not prevent an election, also shews (3) that all parties must consent to it. *Mutlow* v. *Bigg* (4) and *In re Gordon* (5) are to the same effect. In all those cases there was no act which told against election, whereas in this case there are several, namely, the assignments in 1843 and 1847, the conveyances by Lady Macfarlane, and the report in Lunacy.

The trust for sale continued in force, and the trustee could not become the purchaser; at all events the point is not clear, and there are so many questions in dispute that the Court will not force such a title on the purchaser.

Cur. adv. vult.

May 6. BYRNE J. stated the facts as set forth above, and continued:—The point for determination upon the present summons is whether the vendor was or was not a trustee for sale at the date of his purchase, and as such incapable of purchasing.

Undoubtedly the leaseholds in question were under the will of Sir R. Macfarlane subject to a trust for sale, and, unless a valid and effectual appropriation was effected to answer the annuities, it was not competent for the trustees of the will to make a valid transfer to Robert Macfarlane of any part of the testator's trust estate.

The appropriation of the leasehold property, by the affidavit of Sir Charles Douglas stated to have been made, is not in

(1) 11 Ch. D. 341, 351.
(2) 17 Beav. 314.
(3) 17 Beav. 319.
(4) 1 Ch. D. 385.
(5) 6 Ch. D. 531.

accordance with the terms of the will, which required appropriation of investments, and as against Henry Macfarlane certainly, and as against any other beneficiary not accepting such appropriation, it was not effectual to destroy the trust for sale of the leaseholds. No definite date is given for the act or acts of supposed appropriation, and I do not know how it is supposed to have been effected, unless by leaving the leaseholds in question and the securities vested in the trustees, and by transferring the rest of the estate to Robert Macfarlane. As a matter of fact, I do not know whether all the remaining property ever was transferred.

There could be no release of the trust for sale by the beneficiaries, either original or claiming by derivative title, nor any election by them to take the leaseholds in question "in specie," down to the time when Henry Macfarlane was found a lunatic by inquisition in 1878, inasmuch as he had never been from the time of the death of the original testator competent either to release or to elect.

Then was there any election on his behalf in the lunacy proceedings? I have first the report of the master finding the property of the lunatic, which does find a moiety of the property in question as belonging absolutely to him, and stating that the other moiety belongs to Sir C. Douglas; but it is so found subject as to the entirety to an annuity of 500*l.*, payable to Henry Macfarlane during his life.

This finding is clearly inaccurate, unless read as meaning entitled beneficially, inasmuch as the legal estate in the entirety was undoubtedly then vested in Sir Charles Douglas; but, unless I am wrong in my view that at that date there had neither been appropriation nor release of the trust for sale, nor election to take "in specie," the report is also inaccurate in not describing the interest as being a moiety of the proceeds of sale of the entirety of the leaseholds which were then subject to a trust for sale.

I cannot accept this finding as operating, or as intended to operate, as an election on behalf of the lunatic, nor as intended in any way to alter or modify his rights. Neither am I able to attribute any such effect to the underlease of February 20,

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1888, granted with the sanction of the Master in Lunacy. The recital in it of the interest of the lunatic in the property does not even accord with the finding of the property, for it contains no reference to the entirety of the property being subject to the annuity, nor does it recognise the fact that the legal estate in the entirety was vested in Sir Charles Douglas. I think that there is no sufficient evidence of an election on behalf of the lunatic to change or alter his actual rights and interests in the property.

To establish an election to take "in specie" and free from a trust to convert, I think it is necessary to have sufficient evidence of the election to be derived from declarations or acts and conduct of the parties, and where it is sought to establish such an election by a person or persons only entitled so to elect subject to the rights of third persons to insist upon a sale, it must be shewn in like manner that such persons have assented. In the case of *Sisson* v. *Giles* (1), before Lord Westbury, he held that to effect a reconversion the parties directing it must be absolutely interested in the property in question, and if they had only limited or defeasible interests there could be no conversion. In *Mutlow* v. *Bigg* (2), where a testator, after giving legacies, devised a freehold house to three persons in trust for sale, the proceeds to be considered part of his personal estate, and gave his residuary real and personal estate to the same three persons, the Court held on the facts that the three being competent so to do had by their conduct elected to reconvert, and that certain unsatisfied legatees, who had, as James L.J. pointed out, no interest in the question whether the other persons should or should not take the property as real or as personal estate, had so acted that their consent ought to be inferred.

In truth, all the cases turn on the particular facts; and in the present case I am unable to satisfy myself that there ever was a valid and effectual election to take "in specie" by or with the assent of all persons interested in the matter, one of such persons not having been competent to give assent.

Then it was argued that, upon the true construction of the will of Sir R. Macfarlane, the trust for sale came to an end on

(1) 3 D. J. & S. 614. (2) 1 Ch. D. 385.

the cesser of the annuities because of the frame of the gift to Robert Macfarlane, and the case of *In re Hotchkys* (1) was referred to; but that was a case in which it was held that there was no trust for sale, but only a power, and the fact that the ultimate trust for the remainderman was in form a direct gift of the real and personal estate was relied upon by the Court as supporting that view. It does not appear to me that that case assists the contention. It is quite true that, had the annuities been all satisfied or provided for by the appropriation, and had Robert Macfarlane been then living, he would have been entitled to ask for a conveyance of the whole or of the unappropriated part of the estate "in specie"; but that position never arose in the present case. It was suggested that if this view were not adopted the trust for sale might be void for perpetuity, the exercise of it not being confined within the proper limit, and *Goodier* v. *Edmunds* (2) was cited; but in that case the trust for sale did not arise under the terms of the will until after the legal period, and it does not seem to me to bear upon the present case, where there is an immediate trust for sale, and the parties to take under the will are all lives in being at its date. If authority be wanted to shew that a trust for sale does not come to an end simply because the persons to take are ascertained and sui juris at the time of distribution, I think that the case of *In re Tweedie and Miles* (3) is in point.

Upon a consideration of all the facts of the present case, I have come to the conclusion that there never was an effectual election to take the property the subject-matter of the contract otherwise than in the form directed by the testator, and that the trust for sale was operative and capable of being exercised by the present vendor at the date when he affected to purchase; he was consequently a trustee for sale, and as such incompetent to purchase without the assent of all persons beneficially interested.

But apart from this, and assuming that I am wrong in the view I take, it is quite clear that the title is one depending upon

(1) 32 Ch. D. 408. (2) [1893] 3 Ch. 455.
(3) 27 Ch. D. 315.

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the establishment of facts and dealings of a complicated, and in some instances of an ambiguous, nature, such as are not merely practically capable of being challenged or put in issue, but not unlikely to be raised, and with a reasonable chance of success, particularly having regard to the enormous expansion of price for a wasting property in eight years, to the unsatisfactory nature of the valuation made for Mrs. Begbie on the occasion of the former transaction, and to the general nature of the case.

Under these circumstances I think I ought to follow the course pursued in other cases, the last of which is *In re Handman and Wilcox's Contract* (1), and hold that the title is not one which ought to be forced upon a purchaser.

Solicitors: *Dale, Newman & Hood; Walker, Martineau & Co.*

H. C. R.

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1902
April 17.

In re DAVIS.
DAVIS *v.* DAVIS.

[1900 D. 1524.]

Trustee—Breach of Trust—Trust Moneys employed in Trade—Rate of Interest.

It is still the rule of the Court that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment or, at the option of the cestuis que trust, be charged with interest at the rate of 5 per cent.

THIS was an action by the beneficiaries under the will of J. Davis, deceased, against the trustees of the will, alleging divers breaches of trust and claiming accounts on the footing of wilful default, and, if necessary, administration of the estate. The plaintiffs failed to establish any default on the part of the defendants, except the following:—

On March 28, 1899, the defendants received the sum of 6400*l.*, being the proceeds of sale of part of the trust estate.

(1) [1902] 1 Ch. 599.

The defendants had a trust account in their names at the London and Westminster Bank, Limited, and at this date the bank rate of interest on deposits was 1½ per cent., and there were no securities immediately available in which the defendants could invest, in accordance with the terms of the testator's will, to pay more than 3 per cent. The defendants, therefore, acting in good faith and with the view to benefit the plaintiffs, lent the 6400*l.* as a temporary investment at 3½ per cent. interest to a firm in which one of the defendants was a partner. The firm banked with the London and Westminster Bank, Limited, and, for the purposes of their business, had an overdraft of about 20,000*l.*, carrying interest at 3½ per cent., but which was fully secured; and the 6400*l.* was applied in temporary reduction of this overdraft. On April 25, 1900, the defendants withdrew the 6400*l.* from the firm, and invested it to advantage in proper securities.

Bramwell Davis, K.C., and *Dunham*, for the plaintiffs. We are entitled to an account of the actual profits made by employing the 6400*l.* in the business: *Docker* v. *Somes* (1); Lewin on Trusts, 10th ed. p. 298. But such an account may be troublesome and expensive, and we elect to take interest at the commercial rate of 5 per cent.: *Vyse* v. *Foster*. (2)

Upjohn, K.C., and *Le Riche*, for the defendants. We do not say that the investment was a proper one. But the defendants did not use the money for their own purposes. They acted from motives of kindness and with a view to benefit the plaintiffs. In Lewin on Trusts, 10th ed. p. 383, the learned editor says: "Until very recently an executor has usually been charged with interest at the rate of 4 per cent., except in those special cases where interest at the higher or mercantile rate of 5 per cent. has been charged. It has, however, long been felt that, in view of the diminished rate of interest obtainable on investments of trust money, the time has arrived when the rates to be charged ought to be reduced

(1) (1834) 2 My. & K. 655; 39 R. R. 317.
(2) (1872) L. R. 8 Ch. 309, 329.

FARWELL J. 1902 DAVIS, *In re.* DAVIS *v.* DAVIS.

from 4 per cent. to 3, and from 5 per cent. to 4. In some of the later cases this view has been acted upon by the Court, and although, at the present juncture, it would be going too far to say that the Court has altered the rule, the current of recent authority certainly tends in that direction." We submit that the present is eminently a case in which under the circumstances the rate of interest should be reduced from 5 per cent. to 4 per cent.: *Melland* v. *Gray* (1); *Wainwright's Case.* (2)

Bramwell Davis, K.C., in reply.

FARWELL J. This action asks for relief on various grounds, which I have disposed of as the case went on, but there remains the matter in which the trustees no doubt have done wrong. I credit the defendant Rosenfelt with the desire to do the best he could for the plaintiffs—indeed, he seems to have acted with great consideration and kindness. The action charges the trustees with not having accounted and other matters. Those charges are without any foundation, and, so far as they are concerned, I dismiss the action with costs. Then there is this one point, as to which, although the defendants were challenged about two days before the writ was issued, no opportunity of making amends was given to them. What they did was this. They received 6400*l.*, and if they had placed that sum on deposit at their bankers and the bank rate had been paid on it, the sum would have earned 1½ per cent. The plaintiff Davis, the tenant for life, was in want of money, and the defendants thought it would be advantageous for him to have 3½ per cent. on deposit, and wait to see how trust securities would go in the market. No doubt the trustees were entitled to keep the money on deposit at the bank for a short time; but they in fact kept it for over a year. They paid it to the firm in which one of themselves, Mr. Rosenfelt, was a partner under these circumstances: Mr. Rosenfelt's business was in want of ready money from time to time, and he and his partners had deposited securities to a very large

(1) (1845) 2 Coll. 295, 301. (2) (1889) 62 L. T. 30, 33.

amount, namely, 60,000*l.*, with their bankers, in order to be allowed, whenever they pleased, to overdraw up to 20,000*l.* At the time this took place they had an overdraft of about 18,000*l.*, on which they were paying 3½ per cent. to their bankers. The defendants could not get 3½ per cent. on the 6400*l.*, and so they placed it with the firm by reducing their overdraft to this extent, and paid the plaintiff, Mr. Davis, the 3½ per cent. instead of paying it to their bankers. Now, I can only say that that is not justifiable, although not dishonest or morally wrong. Mr. Bramwell Davis has very properly elected, considering that the sum is small and that the expense of an account would be great, to ask me to make the alternative order which I am bound by the rule stated in *Vyse* v. *Foster* (1) to give him. James L.J. there says (2): "If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the cestui que trust, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent." Now, it is quite true that it has been suggested in subsequent cases, and by the editor of Lewin on Trusts, that perhaps 5 per cent. is hardly the mercantile rate of interest now; but I do not feel at liberty so to decide, or to alter the 5 per cent. mentioned by James L.J. The result is that, so far as this particular matter is concerned, the defendants must be charged with interest at the rate of 5 per cent., that is to say, they must pay the difference between 3½ and 5 per cent. for the period during which the 6400*l.* was invested with the firm. Then this sum will be set off against the costs of the action. As to the costs of this particular matter, inasmuch as the trustees in my opinion were quite honest, and really did the best they could for the benefit of the plaintiffs, and were not given any opportunity of setting the

(1) L. R. 8 Ch. 309. (2) L. R. 8 Ch. 329.

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matter right before action, I am not going to order them to pay the costs of it.

Solicitors: *Gedge, Kirby & Millett; Joseph & Hyam.*

NOTE. — The rate of interest to be allowed on a debt came before Mathew L.J. in Lunacy in Chambers on March 24 last in the case of

In re HUNT.
HARVEY'S CLAIM.

Lunacy—Insolvent Estate—Proof of Debt—Rate of Interest.

SIR F. HUNT, being in failing health and incapable of managing his affairs, a receiver of his estate was appointed under s. 119 of the Lunacy Act, 1890. The estate was insolvent and was being administered in Lunacy. Under the usual notice to creditors to come in and prove their claims, Harvey lodged a proof for 35,000*l.*, comprising numerous sums which he had from time to time paid as a surety under a contract of indemnity from Sir F. Hunt, and he also claimed interest at 4 per cent. from the date of each payment and the costs of proving his claim. The master admitted the proof for 35,000*l.*, with interest only at 3 per cent., and without costs. On appeal:—

Chaster, for the appellant. The old rule was that 4 per cent. interest was payable in cases of this kind: *Lawson* v. *Wright*, (1786) 1 Cox, 275; *Hitchman* v. *Stewart*, (1855) 3 Drew. 271; *In re Swan's Estate*, (1869) Ir. R. 4 Eq. 209; *Petre* v. *Duncombe*, (1851) 2 L. M. & P. 107; *Ex parte Bishop*, (1880) 15 Ch. D. 400; *In re Lambert*, [1897] 2 Ch. 169, 180. The same rate is still payable.

T. L. Wilkinson, for the receiver. Recent authorities shew that the old rate of 4 per cent. is now considered too high, and that 3 per cent. only should be charged: *In re Goodenough*, [1895] 2 Ch. 537; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; *In re Lambert*, [1897] 2 Ch. 169.

Chaster, in reply.

MATHEW L.J. It seems clear on the authorities that the old rate of interest on debts has not been altered. Four per cent. has always been the rate allowed on a judgment debt, and the same rate is allowable on a debt of this kind. The appeal will be allowed with costs of and incidental to the proof of the claim and of the appeal, such costs to be added to the claim.

Solicitors: *Ingle, Holmes & Sons*; *Wellington Taylor.*

H. L. F.

AERATORS, LIMITED *v.* TOLLITT.

FARWELL J.

1902

May 27, 31.

[1902 A. 795.]

Company—Registered Name—Proposed new Company—Similarity of Name—Injunction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.

On an application by a company registered under the Companies Act, 1862, to restrain the registration of a new company with a title alleged to be so similar to that of the old company as to be calculated to deceive, it is material to consider—(1.) what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new company; and (2.) what sort of name has been adopted by the old company.

A company cannot, merely by registering as its title, or part of its title, a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies.

A company registered as "Aerators, Limited," sought to restrain the registration of a new company with the name "Automatic Aerators Patents, Limited," on the ground that it so nearly resembled the name of the plaintiff company as to be calculated to deceive. The principal object of both companies was the manufacture of apparatus for the instantaneous automatic aeration of liquids; but the patents and apparatus of the plaintiff company were quite different from those of the defendants:—

Held, that the plaintiff company had no monopoly of the word "Aerator," which was a word in common use in the English language; and the injunction was refused.

THE plaintiff company was incorporated in February, 1900, for the purpose of working a certain patent for the instantaneous automatic aeration of liquids. They had a large and increasing business in England and the Colonies. The apparatus which they sold was portable, and had become known in the trade and to the public under the name of "Sparklets," and was very suitable for private use. The defendants were the seven signatories to the memorandum and articles of association of a new company to be called "Automatic Aerators Patents, Limited." Its object also was to work certain patents for the instantaneous automatic aeration of liquids; but its patents and apparatus were quite different from those of the plaintiff company, and were more suitable for hotels, public-

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houses, refreshment-bars, and such like. The defendants lodged the necessary papers for registration at Somerset House on May 14, 1902. Early in the same month the directors of the plaintiff company heard that a new company, to be called "Automatic Aerators, Limited," was about to be formed. They strongly objected to this, and, accordingly, with the view of protecting the name of their company, they prepared a memorandum and articles of association of a new company under the title of "Automatic Aerators, Limited," which they tendered for registration at Somerset House; but the registrar declined to accept them, because the defendants' papers had already been lodged. Thereupon the writ in this action was issued, claiming an injunction to restrain the defendants from registering a company under the title of "Automatic Aerators Patents, Limited," or in any other name so nearly resembling the name of the plaintiff company as to be calculated to deceive.

On motion for an interim injunction, it was by consent agreed that the motion should be treated as the trial of the action, and should be set down for hearing with witnesses. It now came on. The evidence is sufficiently noticed in the arguments and judgment.

Jenkins, K.C., and *J. G. Wood*, for the plaintiffs. The defendants have taken the whole of our title and made it part of their title. They have no right to do that. The case falls within the principle of *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.* (1) We object to their taking the word "Aerator." The whole English language is open to them, and the word "Aeration," to which there is no objection, would be equally suitable for them. The attempt to register "Automatic Aerators, Limited," was bonâ fide, and made with the intention of carrying on business as well as protecting the plaintiffs' title. Our evidence shews that there is such similarity between the two names that it is calculated to deceive and to cause confusion in the mind of the public, and it may lead to orders being sent to the defendants that are

(1) [1898] 1 Ch. 539; [1899] A. C. 83.

intended for the plaintiffs. This may cause them irreparable injury. We were entitled to register the word "Aerator" as part of our title, although it is a word in common use; and it gives us a monopoly, and enables us to prevent the registration of any other name so similar as to be calculated to deceive.

Upjohn, K.C., and *George Lawrence*, for the defendants. If the plaintiffs succeed, no company can take and use the word "Aerator" as part of its name. It is not a question of name merely, but the statutory test is, Is it calculated to deceive? When the name of the first company is a word in very general use, the mere taking of that word, guarded with other words, does not create such a similarity as is calculated to deceive. The *Manchester Brewery Case* (1) does not apply. The word "Aerator" has been in common use in the English language for many years: The Dictionary of Mechanics and the Oxford English Dictionary.

[FARWELL J. referred to the Century Dictionary.]

The plaintiffs cannot by registering the word as their title create a monopoly of it for themselves, nor can they found an equity on the blunders that others may make: *Turton* v. *Turton*. (2)

FARWELL J. The plaintiffs, "Aerators, Limited," claim an injunction to restrain the defendants from registering a company under the name of "Automatic Aerators Patents, Limited," on the ground that such name so nearly resembles the plaintiffs' name as to be calculated to deceive within the meaning of the 20th section of the Companies Act, 1862. The plaintiffs were incorporated in the year 1900, and took over the business of a similar company of the same name incorporated in 1896. Their business consists in the sale of "Sparklets": this word is their trade-mark, and they have largely advertised "Sparklets." I understand them to be a small apparatus containing compressed carbonic acid gas, by means of which contents of bottles are aerated. One of the merits claimed for them is their portability and their applicability to a small quantity of liquid. The defendants propose that the new company to be formed by them

(1) [1898] 1 Ch. 539; [1899] A. C. 83. (2) (1889) 42 Ch. D. 128.

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shall acquire patents for the aeration of liquids contained in tanks or cisterns of large size, and shall either work such patents themselves, or shall form subsidiary companies for the development of such patents. The 20th section of the Companies Act, 1862, enacts that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," except in certain cases which are not material to the present case. It will be observed that a company has, therefore, a greater right than an individual in respect of names that are identical. For John Smith cannot prevent other persons of the same name from using their own name; but John Smith, Limited, can prevent the registration of any other company as John Smith, Limited. I do not, however, consider that it follows that the Legislature has intended to give companies any greater rights than individuals possess in respect of names which are not identical, but only similar, and it has been held that "calculated to deceive" does not point to intentional fraud; but it is a question of fact in each case whether the name of the new company is so similar to that of the old company as to induce the belief that the two companies are identical. In considering this question it is material to ascertain—(1.) what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new one; (2.) what sort of name has been adopted by the old company. As to the first point, I do not think that it is sufficient for an existing company to point to clauses in its memorandum which will enable it to extend its operations to numerous classes of trade, unless it can satisfy the Court that it either has carried on or really proposes within a limited time to carry on such particular business. It cannot, I think, be enough in these days, when the objects of a company are usually limited only by the number of letters in the alphabet and extend to every form of business, whether connected or not with the principal object, to shew that the intended new company includes some similar objects. It is necessary to see whether the real objects of the second company are similar. As to the second point, I think that it is

necessary to consider the nature of the title registered by the old company. The plaintiffs have argued that the House of Lords in *Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.* (1) decided that in no case can a new company take the whole title of an existing company, whatever additional words they may add to it, and they accordingly claim a monopoly in the word "Aerators." In my opinion this is not correct. The House found as a fact in the case before them that the adoption by the defendant company of the whole of the plaintiffs' title, although added to other words, was "calculated to deceive"; but it appears to me impossible to say, as a general proposition, that a company can, by registering a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies. In the present case the plaintiffs have taken a word which, and which only, aptly and rightly describes a machine for producing a particular result. The word has been in common use in the English language for at least thirty years. It is to be found in dictionaries such as the Century (1889), Oxford English Dictionary (1888, in a quotation dated 1861), and the Dictionary of Mechanics (1876), to which one of the witnesses referred. It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English language which aptly describes the articles they manufacture or deal in, or the name of the individual associated for years with a particular firm. For example, suppose a company had registered the name of "Motors, Limited," and another the name of "Automobiles, Limited," it appears to me impossible to say that they thereby prevent all other companies from using as part of their title these two words, which, so far as I know, are the only words which represent the fashionable locomotives of the day, although their sole trade was the manufacture and sale of motors and automobiles. Or again, to take an instance of names, it would be absurd to suppose that Barclay & Co., Limited, the well-known bankers, could restrain Barclay, Perkins & Co., Limited, the well-

(1) [1899] A. C. 83.

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known brewers, from registering as such on the ground that they take the whole of the title of the banking firm. In considering whether a name is calculated to deceive it is, as I have said, material to see what that name is; and if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even of the name of a place. The latter may well point to a particular company; the former certainly points primâ facie to the machine or article, and can only under very exceptional circumstances and by a long course of usage point to the company, rather than the thing itself. English-speaking people know "Aerators," "Motors," and the like, as machines, not as companies, and the presence of such a word in the title of a company suggests that the company deals in these machines, not that it has anything to do with a company of that name. If the plaintiffs assert the contrary, it is for them to prove it, and the principles applied by the House of Lords in *Reddaway* v. *Banham* (1), explained as they were in *Cellular Clothing Co.* v. *Maxton* (2), to which I had occasion to refer in *Chivers & Sons* v. *Chivers & Co., Ld.* (3), apply as much to the name of a company under s. 20 as to the "Camels-hair Belting," the "Cellular Clothing," and the name of "Chivers" in those cases. I will read the passage from Lord Shand's judgment (4) that I read in *Chivers' Case* (3): "Of that case I shall only say, that it no doubt shews it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our own language and which is

(1) [1896] A. C. 199, 208.
(2) [1899] A. C. 326.
(3) (1900) 17 Rep. Pat. Cas. 420.
(4) [1899] A. C. 340.

descriptive only—and, indeed, were it not for the decision in *Reddaway's Case* (1), I should say this should be made altogether impossible."

The plaintiffs further argued that the Act of Parliament was intended for the protection of the public, and that there must necessarily be some confusion in the minds of the public if the whole of their title is taken; but I would point out that the plaintiffs cannot assert in their own names the right of the public: that is for the Attorney-General; they can only assert their own rights as members of the public, if and so far as they can shew special damage to themselves. But the choice of their own name rests with themselves; the registrar has no discretion to refuse to register any name put forward on behalf of a company; and if, by reason of their adoption of one single word in common use, they run the risk of suffering injury, they have only themselves to thank, and they can no more acquire a monopoly in the use of the word "Aerators," by adopting that as their title, than an individual can acquire a monopoly in his own name or the name of the article he manufactures; as in the latter case it is necessary for the individual to shew, not merely that the defendant is trading under his name or is making the article the name of which he has adopted, but also that the name or article is exclusively identified with his own manufacture so as to have acquired a secondary meaning; so a company must also shew that the name which primâ facie refers to a number of persons or articles is in fact identified solely with the plaintiffs before they can satisfy the Court that its use as part of another company's name is calculated to deceive. A name is not necessarily calculated to deceive because it is similar; it must depend in great measure upon what the nature of the name is; and if it merely represents the name of the article supplied by the company, it would require very strong evidence to shew that such name had lost its primary meaning, and had become identified with the plaintiff company.

In the case before me, as, indeed, in all cases under s. 20, the action is a quia timet action, and evidence of actual mistake is

(1) [1896] A. C. 199.

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therefore impossible; but there is in fact no evidence, to my mind, of any probability of deception. The plaintiffs' trade-mark is "Sparklets," and this name is put prominently forward on their shop-front, invoices, bill-heads, and letter-paper. The articles in which they deal are very different from those to be manufactured under the defendants' patents. When the plaintiffs ascertained that the defendants intended to register the "Automatic Aerators Patents, Limited," they themselves applied to register another company under the same, or all but the same, title, and were only prevented from so doing because the defendants' application was first lodged. The plaintiffs' managing director, who gave his evidence in a very fair and candid manner, stated that although their chief object was to be beforehand with the defendants and prevent the registration of the name, yet that they had intended that the new company should carry on business under this title, and that if proper care was taken they did not anticipate that any confusion would arise. Yet this new company of the plaintiffs was intended to deal in articles similar to those sold by the plaintiffs; and if due care can prevent confusion in such a case, a fortiori it can do so where the articles dealt in are so different as those of the plaintiffs and the defendants. In my opinion, the plaintiffs' action is an attempt to monopolize for the purpose of nomenclature a word in ordinary use in the English language, and fails, and must be dismissed with costs.

Solicitors for plaintiff company: *Wainwright & Co.*
Solicitors for defendants: *Hind & Robinson.*

H. L. F.

In re CLARKE'S SETTLEMENT.

BUCKLEY J.

[1902 C. 814.]

1902

May 14.

Settled Land—Tenant for Life and Remainderman—Capital Money, Application of—Additions and Alterations with a view to Letting—Electric Lighting Installation—Settled Land Acts, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*

The word "additions" in s. 13, sub-s. ii., of the Settled Land Act, 1890, means structural additions; and, therefore, an electric lighting installation, even if exclusive of fittings such as would be ordinarily supplied by a tenant, is not an addition to a building within the sub-section.

In re Gaskell's Settled Estates, [1894] 1 Ch. 485, followed.

In re Freake's Settlement, [1902] 1 Ch. 97, not followed.

ORIGINATING SUMMONS.

Mr. R. C. Thornhill was tenant for life under a settlement of estates which included a property near Uxbridge called the Swakeleys estate, consisting of a large mansion-house and about 1500 acres of land. He did not reside on the property, and had no intention of doing so. The house and shooting had been let for some years to a tenant whose term came to an end on March 25, 1901, and in consequence of his death shortly afterwards a fresh tenant had to be found. Mr. A. N. Gilbey in August, 1901, agreed to take the house and shooting on condition that certain repairs and improvements were carried out, including the installation of electric lighting in the house. The works were at once done at the expense of Mr. Thornhill without previously submitting a scheme to the trustees, for which there was no time; and on October 24, 1901, a lease was executed to Mr. Gilbey for eleven years from March 25, 1901, at a rent of 555*l.* a year.

There was evidence that Mr. Gilbey would not have taken the property unless the works were carried out, that it was too late in the season to allow any hope of getting another tenant, and that there had not previously been any gas laid on to the house. Mr. Thornhill had paid 331*l.* 7*s.* 5*d.* out of his own pocket, and was liable to pay a further sum of 291*l.* 15*s.* 3*d.* in respect of the improvements. He took out a summons asking,

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inter alia, that the trustees of the settlement might be directed to pay out of capital moneys in their hands 148*l.* 15*s.* for installing electric light at Swakeleys.

The specification described the work as wiring for electric light, and referred to the quality of the wire and cables and other materials, but the details of the effect of the work upon the structure of the house were not given. The Uxbridge and District Electric Supply Company had agreed to supply the necessary power, and until their connection was established an engine and dynamo had been hired.

Other improvements were included in the application, but no question calling for a report arose as to them.

W. A. Peck (*Birrell, K.C.*, with him), for the tenant for life. It was most important to secure this tenant. It was so late in the season that, if we had not done so, the house and shooting would have remained on our hands during the whole winter. The improvements had to be made, and we contend that all of them ought to be paid for out of capital, under s. 25 of the Settled Land Act, 1882, and ss. 13 and 15 of the Settled Land Act, 1890. There can be no dispute that the electric lighting installation was "reasonably necessary or proper to enable the same to be let," within s. 13, sub-s. ii., of the Act of 1890; and we submit that it is an addition to the building within the words "additions to or alterations in buildings" in the former part of the sub-section. We do not ask that the fittings should be allowed; the application is confined to the wiring. The point has been decided in our favour by Joyce J. in *In re Freake's Settlement* (1), which has been followed in chambers by Kekewich J. in *In re Lord Howe's Settled Estates*, February 17, 1902. (2)

[BUCKLEY J. In *In re Gaskell's Settled Estates* (3) Chitty J. held that additions must be structural.]

Addition means anything fixed to a building so that a tenant could not remove it. The word has a very wide meaning attributed to it in the dictionaries: for instance, in the Oxford

(1) [1902] 1 Ch. 97. (2) Unreported.
(3) [1894] 1 Ch. 485.

English Dictionary and in Johnson's Dictionary, which quotes a passage from Hale's Origin of Mankind to the effect that "furniture is an additament or addition to the fabrick of a palace."

[BUCKLEY J. I agree that the word "addition" can be used in a wide sense, but the question is what it means in this sub-section.]

It need not mean additional building. Anything added to a house would be within the sub-section if necessary or proper to enable it to be let. Furniture in an out of the way shooting-lodge would be an addition. Chitty J. did not decide that additions must be structural. He did not use the word "structural" with reference to additions, and if the decision went as far as that it was wrong. If an addition must be structural, it only means the same as alteration, and the Court will not construe the word so as to make it useless. Even if that is the true construction, an installation of electric lighting is a structural alteration in a building.

T. H. Robertson, for the trustees, offered no opposition to the application.

BUCKLEY J. The question I have to determine on this summons is as to the true construction, in s. 13, sub-s. ii., of the Settled Land Act, 1890, of the words "additions to or alterations in buildings." Mr. Peck, for the tenant for life, has addressed an argument to the Court which he was bound to allow involved the proposition that "additions" in that section meant "additions" of any kind. He read passages from some of the dictionaries to shew what I should have thought—without the aid of a dictionary—was obvious, that an addition means something added to something else. A thing is none the less an addition, in the largest sense of the word, because it is not of the same quality as that to which it is added. But if the word in this section were understood in that sense there would fall within the word "additions" all such things as venetian blinds, outside sun-blinds, furniture put into an unfurnished house, a park added to a mansion-house which enjoyed no park, or a right of fishing or shooting added

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to a country house which had none such. All these are additions; but are they additions to buildings within the meaning of this sub-section? I think not. It might well be the case that a house could not be let unless it enjoyed, say, a certain amount of park or meadow, or unless, in the case say of a shooting-box in the Highlands, it were offered as a furnished and not as an unfurnished house. But an "addition to buildings" within this section does not, I think, include the addition of land to a house, or furniture to a house. The "addition" here means structural addition in some sense of the word. In such a context as this the addition must be of the same quality as the thing added to. If another child be born to a father, or his income be augmented by 1000*l.* a year, there will have been in each case an addition. But in the one case the 1000*l.* could not be spoken of as an addition to his family, nor in the other the child as an addition to his income. Further, the section speaks of "additions to or alterations in buildings." An alteration in a building must be a structural alteration. A building is a structure, and an alteration of a structure must be structural. The argument, then, addressed to me on the part of the tenant for life amounts to this—that whereas of these two nouns substantive one, namely, "alterations," must mean "structural alterations," the other, namely, "additions," means, not "structural additions," but any addition whether structural or not. I think that is contrary to true principles of construction. I understand this sentence to mean the addition to the building of some further building, or the alteration of the building by removing and replacing in some form some part of the building—that is to say, both the one and the other are to be structural.

This matter is not without authority. The question was considered by the late Lord Justice Chitty, when a judge of first instance, in *In re Gaskell's Settled Estates.* (1) The question there was whether the addition of a fixed boiler with hot-water pipes running through the house, for the purpose of warming it, was an addition within this section. An addition in a sense, of course, it was: the building had more in it after

(1) [1894] 1 Ch. 485.

the boiler and hot-water pipes were put there than it had before; but the learned judge held that it was not within the section. As I read the judgment, he construed these words as meaning "structural additions" or "structural alterations." In order to shew that, I will read one or two of his remarks. The learned judge says (1): "Sect. 13, sub-s. ii., is very precise in its terms, and is confined to 'additions to or alterations in buildings,' and any improvement authorized under this sub-s. ii. must therefore be an addition or alteration in the building." His Lordship then goes on to point out that although the boiler and hot-water pipes will make the house much more comfortable and convenient, that does not bring it within the scope of the section. At the top of the next page he says: "I am of opinion that this warming apparatus, however convenient it may be to the occupier, is neither an addition to or alteration in the building within the section." It is true that the learned judge did not so far use the word "structural," but clearly that was his meaning, for he next mentions certain other alterations, states that they were "alterations in the structure of the building itself," and therefore holds them to be within s. 13, sub-s. ii. I read *In re Gaskell's Settled Estates* (2), therefore, as a decision that this sub-section refers to structural additions and alterations. But then it is said that Joyce J. recently in *In re Freake's Settlement* (3) allowed an electric lighting installation to be paid for out of capital as an addition within this section. I have taken the opportunity of speaking to the learned judge about that case, and he tells me he did not intend to lay down any general principle, but that he simply decided on the particular facts of the case before him. In these circumstances, there being the two decisions, *In re Gaskell's Settled Estates* (2), decided by Chitty J., and *In re Freake's Settlement* (3), decided by Joyce J., if they are in conflict, it is open to me to follow my own judgment in the matter; and my own view is that alterations and additions to fall within the section must be structural. The section, I think, must be construed as meaning

(1) [1894] 1 Ch. 488. (2) [1894] 1 Ch. 485.
(3) [1902] 1 Ch. 97.

BUCKLEY J.

1902

CLARKE'S SETTLEMENT, *In re.*

structural additions or alterations of some kind; but no doubt in every case the question will arise whether the addition is structural or not, and this must depend upon the circumstances of the particular case. Here the facts are that there was a house situated near Uxbridge, and a tenant who was minded to take it with electric light, but who would not take it without electric light. The installation of electric light, therefore, was no doubt, within the words of the Act, "reasonably necessary or proper to enable the same to be let." But in my opinion putting the wires into the house was not an addition within the section. It was an addition, but not a structural addition. I cannot discriminate in principle between the boiler and hot-water pipes, the subject of decision in *In re Gaskell's Settled Estates* (1), and the wiring for electric light in this case. For these reasons I must disallow the first item in the summons, which is 148*l.* 15*s.* for the installation of the electric light.

Solicitors for all parties: *Frere, Cholmeley & Co.*

(1) [1894] 1 Ch. 485.

H. C. R.

BUCKLEY J.
1902
June 12

In re BANKES. REYNOLDS *v.* ELLIS.

[1900 B. 854.]

Settlement—Covenant to Settle After-acquired Property—Bequest to Separate Use—Restraint on Anticipation—Marriage with Foreigner—Domicil—Law applicable.

Under a gift to a woman by will of a legacy payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture shall be paid to her for her separate use when and as the same shall become due and payable, and so that she shall not have power to deprive herself of the benefit thereof by anticipation, the legatee is at the date of payment entitled to have the legacy paid to her, and the restraint on anticipation then ceases to operate; and a covenant by her, contained in an ante-nuptial settlement executed before the death of the testator, to settle after-acquired property is effectual to bind the property when transferred to her.

In re Currey, (1886) 32 Ch. D. 361, distinguished.

The matrimonial domicil was Italian. The settlement was in English form, and void under Italian law. The wife's domicil had been English, and the settled funds were English:—

Held, on the facts, that the settlement was governed by English law.

In 1877 Kate Gruinard Anderton, a widow, domiciled in England, became engaged to be married to Angelo Favaroni, an officer in the Italian army. At that time she was possessed of 4000*l.*, and, in order to meet the requirements of the Italian Government with reference to the marriage of officers, she deposited 1000*l.* with the military authorities in that country. On March 28, 1878, she and Favaroni executed in Italy a marriage settlement in English common form, whereby it was agreed that the trustee should hold the remaining sum of 3000*l.* in trust after the marriage, to permit it to remain in its then state of investment or call in and invest it, and pay the income during the joint lives of herself and Favaroni to her for her separate use without power of anticipation; and after the death of either of them to the survivor, and then for the children of the marriage; and subject thereto, if Mrs. Favaroni survived her husband, upon trust after his death for her, her executors,

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administrators, and assigns; but if he survived her, then after his death as she should by will or codicil appoint; and in default of appointment, in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of Mrs. Favaroni had she died possessed thereof intestate and without having been married. And it was also witnessed that, in consideration of the intended marriage, if Mrs. Favaroni then was, or if during the then intended coverture she or Favaroni in her right should at one time and from one source become, entitled to any real or personal property of the value of 100*l.* sterling or upwards for any estate or interest (except jewels and personal chattels, which it was agreed should belong to her for her separate use), then in every such case Favaroni and Mrs. Favaroni and all other necessary parties should, at the cost of the trust estate, as soon as circumstances would admit, do all such acts and things as should be necessary or expedient for effectually vesting the same in the trustee for the time being of the settlement, upon trust that he should call in the property, and hold it and the income thereof upon the trusts and with and subject to the powers and provisions thereinbefore declared concerning the said principal sum of 3000*l.* sterling, and the investments upon which the same might be invested, and the income thereof respectively.

The marriage took place on July 28, 1878, at Florence, and Mr. and Mrs. Favaroni lived in Italy continuously after that time, and were domiciled there. There were no children of the marriage. By a decree dated the 8th and registered on the 28th of March, 1898, of the Civil and Criminal Court of Florence, the Court approved of the official report, declared by the President of the Court, of the legal voluntary separation which had taken place between Mr. and Mrs. Favaroni, subject to certain conditions, and ordered the execution of the report. Since the date of the decree Mr. and Mrs. Favaroni had lived apart from one another.

Meyrick Bankes, the father of Mrs. Favaroni, died on June 16, 1881, having by his will dated February 17, 1877, bequeathed a leasehold house and land in Southport, and

furniture and other chattels, to his wife for life, and after her death to Mrs. Favaroni; and he declared that moneys and personal estate by that his will made payable or transferable to any female should during any and every coverture be paid and transferred to her for her sole and separate use, free from marital control, when and as the same money should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation, and so that her receipt alone, whether covert or sole, should be a good discharge for such moneys and personal estate.

On January 25, 1899, Mrs. Bankes died, having by her will bequeathed to Mrs. Favaroni a legacy of 1000*l.* The legacy given by Mr. Bankes to Mrs. Favaroni also became payable on the death of Mrs. Bankes.

Questions arose whether these legacies were caught by the agreement to settle after-acquired property contained in the settlement, or could be paid and transferred to Mrs. Favaroni on her separate receipt.

The trustee of the settlement commenced an action to determine these questions, and claimed a declaration that the 1000*l.* legacy was subject to the covenant, and ought to be paid to him; and that the property bequeathed by Mr. Bankes was also subject to the clause. There was evidence that according to Italian law the settlement was void because it was not executed before a notary, and because it altered the order of succession under that law; that after marriage the husband and wife remained entitled to their respective fortunes as before; that this position could not be affected by a settlement unless it was attested by a notary; that the separation had no effect upon the individual rights of property; and that the marriage continued after the separation.

Mr. Favaroni was of unsound mind, and represented by the official solicitor as his guardian ad litem.

Buckmaster, K.C., and *S. B. L. Druce*, for the trustee of the settlement. The settlement is governed by English law, and should be enforced accordingly, with the result that both these legacies are caught by the provision for settling after-

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acquired property. It is admitted that in Italian law the settlement is altogether void, and the parties could not have intended that it should have no effect. They clearly meant, and the Court will hold, that it should be treated as regulated by English law: *Van Grutten* v. *Digby*. (1)

[BUCKLEY J. Is there any reason why two persons not English subjects should not contractually agree that a contract between them shall be governed by English law? Dicey's Conflict of Laws, p. 552; *Smallpage's Case*. (2)]

H. Terrell, K.C., and *P. F. Stokes*, for Mrs. Favaroni. That may be so, provided the contract is not void according to the law of the country where it is made: *South African Breweries, Limited* v. *King* (3); *Hamlyn & Co.* v. *Talisker Distillery*. (4)

[BUCKLEY J. referred to *In re Missouri Steamship Co.* (5)]

Buckmaster, K.C. The fact that an English woman is marrying a foreigner will not prevent the application of English law: *In re Mégret*. (6)

H. Terrell, K.C. The question is immaterial, for Mrs. Favaroni is entitled to have all these legacies transferred to her whether English or Italian law applies.

[It was agreed that this point should be argued first.]

By Italian law the settlement was altogether void, and Mrs. Favaroni continued to be entitled to receive these legacies.

If English law applies, the same result follows. The property derived from Mr. Bankes was bequeathed for her separate use without power of anticipation. That is equivalent to a restraint on alienation, and she could not agree to settle it in this way: *In re Currey*. (7) Therefore, if the settlement is English, these legacies are not caught by the covenant.

The 1000*l*. bequeathed by Mrs. Bankes is not caught, because at the time when it became payable the operation of the covenant had come to an end or was suspended: *Davenport* v. *Marshall*. (8)

(1) (1862) 31 Beav. 561.
(2) (1885) 30 Ch. D. 598.
(3) [1899] 2 Ch. 173; [1900] 1 Ch. 273.
(4) [1894] A. C. 202.
(5) (1889) 42 Ch. D. 321.
(6) [1901] 1 Ch. 547.
(7) 32 Ch. D. 361.
(8) [1902] 1 Ch. 82.

By the law of Italy she was in the position of a feme sole in respect of her property after the marriage, and also after the separation; the rights of her husband were excluded, and the covenant was unnecessary and inoperative. The covenant was to be in force during the said intended coverture, not during the marriage, and it was inoperative during the separation: *Dawes* v. *Creyke*. (1) This point applies to all the legacies.

Astbury, K.C., and *T. T. Methold*, for Mr. Favaroni. There is no doubt that if Italian law prevails the settlement is void, and Mr. Favaroni takes nothing. But if the settlement is governed by English law, the first question is whether, under Mr. Bankes' will, Mrs. Favaroni could, notwithstanding the restraint on anticipation, claim to have the legacies left by him paid to her when they became payable. We submit that she could, and therefore that she could agree to settle them; the agreement is good, and the legacies are bound by it. *In re Currey* (2) was only a question of construction, and does not apply to this case. It followed *In re Ellis' Trusts* (3), which decided that anticipation was equivalent to alienation, but is not otherwise in point. Mrs. Favaroni was entitled on her mother's death to receive the legacies given by her father and spend them; the restraint only applied till then: *In re Bown* (4); *In re Holmes*. (5) She was only restrained from anticipation during coverture. Therefore she could, before marriage and before the legacies became payable, execute a deed providing what should be done with them: *In re Wood*. (6)

The covenant applied after the separation. The words "during the said intended coverture" are equivalent to during the marriage: Blackstone's Commentaries, vol. i. p. 442; Wharton's Law Lexicon, "Coverture." *Davenport* v. *Marshall* (7) and *Dawes* v. *Creyke* (1) have nothing to do with this case, for there has been no order under the Matrimonial Causes Act, 1857.

H. Terrell, K.C., in reply. It may be that if, as in the cases

(1) (1885) 30 Ch. D. 500.
(2) 32 Ch. D. 361.
(3) (1874) L. R. 17 Eq. 409.
(4) (1884) 27 Ch. D. 411.
(5) (1892) 67 L. T. 335.
(6) (1889) 61 L. T. 197.
(7) [1902] 1 Ch. 82.

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cited, a feme sole is entitled to property, whether in possession or reversion, which in the event of her marriage would be settled with a restraint on anticipation, she can alienate it before her marriage. But it is not competent for a woman who has no property to contract that if she shall at any time during marriage become entitled to property subject to a restraint on anticipation, that property shall be treated as free from anticipation, and shall be conveyed by her in a certain way. At the date of this settlement Mrs. Favaroni had no interest in these legacies, and could not make such a covenant. To hold that she could agree to alienate this property although she had no power to do so would be to go beyond *Hood Barrs* v. *Heriot.* (1) The covenant to settle is an anticipation.

BUCKLEY J. It is admitted that if the Italian law applies Mrs. Favaroni is entitled. Her counsel argue that the same result ensues if the English law applies. For the moment, therefore, I will assume that the English law applies—and upon that hypothesis see whether the lady is entitled. The only question then which I have to decide at the moment is whether the covenant of the lady to settle after-acquired property contained in this settlement is valid according to English law and binds the two legacies. The settlement was executed on March 28, 1878. It contained a covenant to settle after-acquired property in the usual form, that if the wife was, or during the then intended coverture she or the husband in her right should be or become entitled to real or personal property of the value of 100*l.*, then it should be settled. The property as to which the question arises is of two descriptions. The first which I will take is property that she derives under her father's will. Her father died in 1881—that is to say, three years after the date of the settlement; his will contains certain dispositions in her favour, and it contains this clause: He declared that all moneys and personal estate by his will made payable or transferable to any female should, during any and every coverture, be paid and transferred to her for her sole and separate use, free from marital control, when

(1) [1896] A. C. 174.

and as the same money should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation, and so that her receipt alone, whether covert or sole, should be a good discharge for such moneys and personal estate. Upon words such as these the Court of Appeal has held in *In re Bown* (1) and *In re Holmes* (2) that the restraint on anticipation (or alienation) is effectual only while the interest remains reversionary, and that when the time comes at which the legacy or benefit is payable or transferable the legatee, whether under coverture or not, is entitled to ask for payment or transfer, notwithstanding the words that she shall not have power to deprive herself of the benefit thereof by anticipation. If the date for payment comes the lady is entitled under the gift to receive the money, and as matter of construction the restraint on anticipation enures up to the date of payment, but as from the date for payment is inapplicable. That seems to me to be the effect of *In re Bown* (1) and *In re Holmes*. (2) But then it is said, and truly, that in *In re Currey* (3) Chitty J., following previous decisions, and in particular a decision of Sir George Jessel in *In re Ellis' Trusts* (4), held that a restraint on anticipation is equivalent to a restraint on alienation, and that therefore, when there is an effectual restraint on anticipation, the person so restrained cannot alienate because that is a form of anticipation. Now what took place here? In 1878 the lady, who was at that time not entitled to this property at all because it came to her under the will of a person who died in 1881, covenanted that if she became entitled to money she would settle it. Under the will of 1881 she became entitled to property upon which, if my view as to the effect of *In re Bown* (1) and *In re Holmes* (2) is right, there was a restraint on anticipation until the date of payment, but not subsequently. As soon as the date of payment arrived, that was money which simply belonged to her. She could take it and spend it; and if she could take it and spend it I am unable to understand why she should not, by her ante-nuptial settlement executed in 1878,

(1) 27 Ch. D. 411.
(2) 67 L. T. 335.
(3) 32 Ch. D. 361.
(4) L. R. 17 Eq. 409.

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have bound herself that that money which she might have spent she would not spend, but would settle. I do not think *In re Currey* (1) applies to a state of things in which the clause is in the form of *In re Bown* (2) and *In re Holmes* (3), and in the form in which it is here. Directly you find that under the operation of the gift she becomes entitled to the money, so that under the form of the gift there is no longer any restraint on anticipation, or, which is the same thing, restraint on alienation, I do not know why it should not be bound by her covenant to deal with it in a particular way. It seems to me, therefore, that as regards this property the covenant is operative as from the date when the interest under the father's will became payable.

The other property was property which she derived under her mother's will, and that was simply a legacy of 1000*l.* which was given her by the mother. There is no clause of restraint on anticipation as regards this. It is money which came to her during the marriage, and the question is whether the covenant to settle after-acquired property applies to it. As to this sum, and also, as a second point, as to the legacies given by the father's will, another argument is raised, and it is this—that there was in March, 1898, a decree of separation pronounced by an Italian Court, and that the covenant to settle after-acquired property became, as from 1898, a dead thing, because the covenant was to settle what came to her during any coverture, and the coverture was over. It is said that a decision of my own in *Davenport* v. *Marshall* (4) is applicable to that state of things. I do not think *Davenport* v. *Marshall* (4) has anything to do with it. The ground of that decision was this: As from a decree of judicial separation pronounced by the Divorce Court in this country, a section of the Matrimonial Causes Act, 1857, enacts that the wife shall from the date of the order be considered as a feme sole with respect to property; and I thought that the covenant to settle after-acquired property was only intended, according to its true construction, to apply during such time as she was not in the

(1) 32 Ch. D. 361.
(2) 26 Ch. D. 411.
(3) 67 L. T. 335.
(4) [1902] 1 Ch. 82.

position of a feme sole with respect to property. The evidence as to this Italian order is that it has no such effect as a decree for judicial separation in an English Court; that neither the marriage of an Italian person, nor the separation order, as a separation order, has any effect on the wife's property; that she remains entitled to property as if she had never been married, and the separation order does not alter her rights in respect of property. The whole ground, therefore, of the decision in *Davenport* v. *Marshall* (1) is wanting. Under these circumstances, it is necessary to determine whether the English or the Italian law is applicable.

H. Terrell, K.C., and *P. F. Stokes*, for Mrs. Favaroni. The question has now to be determined whether the settlement is governed by English or by Italian law. In the absence of special circumstances, the law to be applied is the law of the matrimonial domicil, namely, Italy: Dicey's Conflict of Laws, pp. 652–3, rule 172, sub-rule 1. The fact that the settlement is in English form is not sufficient to avoid that general rule. There is no evidence of intention; but the facts shew that the parties meant to be subject to Italian law: the matrimonial domicil was Italian; the settlement was executed, the marriage was solemnised, and they intended to reside, in Italy; 1000*l.* was deposited with the military authorities in Italy; and Mrs. Favaroni from the commencement of the engagement has not lived in England. In *Van Grutten* v. *Digby* (2), which has been mentioned, the property settled was English property. Here the money was invested on an English mortgage, but might have been called in and invested elsewhere.

[BUCKLEY J. referred to *Chamberlain* v. *Napier*. (3)]

Mrs. Favaroni has put herself under Italian law, and is bound by it: *Viditz* v. *O'Hagan*. (4) The covenant, therefore, is now ineffectual.

T. T. Method (*Astbury, K.C.*, with him). The facts shew that the settlement was to be regulated by English law. It

(1) [1902] 1 Ch. 82.
(2) 31 Beav. 561.
(3) (1880) 15 Ch. D. 614, 633.
(4) [1900] 2 Ch. 87.

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was in English form: *In re Barnard* (1); the trustee was English, the property settled was secured on a mortgage on English land, and if called in was to be reinvested in English securities; the settlement refers to the English Statutes of Distribution. *Van Grutten* v. *Digby* (2) is recognised in *Viditz* v. *O'Hagan* (3), and is conclusive in our favour. The Court will not hold that the settlement is under Italian law if the result of that will be to make it entirely invalid. "It is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken": Co. Litt. 42 a.

H. Terrell, K.C., in reply. The Court will not assume that Mrs. Favaroni knew that the settlement would be void under Italian law. If there had been no covenant and she endeavoured now to settle these legacies, she would be unable by Italian law to do so.

BUCKLEY J. The question I now have to determine is whether to this settlement, which was executed on March 28, 1878, the English law or the Italian law is to be applied.

The relevant facts are these: the document is in the English form; it contains this covenant to settle after-acquired property, which would be wholly inoperative if Italian law were applicable to the case. Beyond that the instrument as a whole would, according to the Italian law, have been perfectly invalid, for the evidence is that, inasmuch as it openly violates the legal order of succession established by Italian law, it can have no effect at all in Italy. The further fact is that the wife's domicil was English, and this document provides that the settled fund, which was an English mortgage, if realized and reinvested, should be reinvested in English investments. This is therefore an instrument dealing with the property of a lady who was English, dealing with property which was

(1) (1887) 56 L. T. 9. (2) 31 Beav. 561.
(3) [1900] 2 Ch. 87.

English, providing that in case that particular property changed its form the new form which it assumed should be English, the whole contained in a document which is in the common English form, with the further fact that unless the English law is to be applied the whole thing was invalid, and might have been put behind the fire the moment it was executed, because in Italian law it had no effect at all. It seems to me that upon those facts I ought to arrive at the conclusion that the parties intended to contract according to the English law. The general proposition, as stated in Dicey's Conflict of Laws at p. 653, is this: "A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil." The matrimonial domicil here was Italian, no doubt, so that primâ facie this ought to be construed with reference to the law of the matrimonial domicil. But is there reason to the contrary? It seems to me, on the facts I have mentioned, there is reason to the contrary. I therefore think the English law, and not the Italian law, ought to be applied.

Then this is further argued—that although according to the English law the lady covenanted that she would at a future time so dispose of her after-acquired property as that it would come within the settlement, yet when she married an Italian she acquired an Italian domicil, and according to the Italian law such a covenant is invalid, and that therefore, upon the doctrine of *Viditz* v. *O'Hagan* (1), she could not when the covenant fell to be performed be called upon to perform it. It seems to me that is not so. In *Viditz* v. *O'Hagan* (1) the point was that the settlement was executed by an infant who could not bind herself, and the question was whether, by acts done after attaining majority, and after a foreign domicil had been acquired, there had been such an affirmation of the settlement as that it became binding; in other words, the settlement when executed was nothing, and, unless the English law as to affirmation and confirmation applied, it never became binding. Now here, if I am right, the settlement at the outset was binding because it was executed by a person competent to bind herself.

(1) [1900] 2 Ch. 87.

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Then, if I am entitled to treat the English law as being applicable to it, she could according to our law bind herself in respect of her after-acquired property, and although it took the form of a covenant and not of an assignment, that would make no difference. On that ground it seems to me the covenant was effectual. I therefore hold that this matter is throughout to be governed by English law.

Solicitors: *Woodcock Ryland & Parker, for Alan S. Reynolds, Liverpool; W. H. Winterbotham; Crosse & Sons; Rowcliffes, Rawle & Co., for Peace & Ellis, Wigan.*

H. C. R.

JOYCE J. 1902 *May* 8, 9, 13.

RIDD *v.* THORNE.

[1901 R. 203.]

Solicitor—Lien for Costs—Partnership Action—Money in Court and in hands of Receiver—"Property Recovered or Preserved"—Judgment Creditor—Charging Order—Priority—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

In a partnership action where a receiver had been appointed, a judgment creditor of the partnership firm obtained an order, following *Kewney* v. *Attrill*, (1886) 34 Ch. D. 345, giving him a charge for his debt and costs upon the assets in or to come into the hands of the receiver, the creditor undertaking to deal with the charge according to the order of the Court. Upon an application by the solicitor of the plaintiff in the action for a charging order for his costs under s. 28 of the Solicitors Act, 1860, in priority to the judgment creditor:—

Held, that the solicitor was entitled to succeed.

Semble, an order in the form of *Kewney* v. *Attrill* only operates as a charge as among the creditors of the partnership themselves, or as against the several partners of the firm.

ADJOURNED SUMMONS.

This action was for dissolution of partnership in a business carried on by the plaintiff and the defendant, under the style of "R. Bristow & Sons."

The action was commenced on January 30, 1901. By an order dated February 12, 1901, a receiver was appointed of the assets and business of the partnership. The receiver had

collected and realized all the available assets of the partnership with the exception of some doubtful or disputed book debts; and it appeared that the assets were insufficient to meet the liabilities of the firm. On September 3, 1901, the receiver paid 300*l.* into court in the action, and retained in his hand the sum of 52*l.* 5*s.* These two sums were subject to the payment of his remuneration, fixed by the Court at 52*l.* 10*s.*, and to his solicitor's costs, which had been assessed in chambers at 34*l.* 11*s.* 4*d.* On June 24, 1901, upon the application of Henry Sandell & Sons, and upon the undertaking of their solicitors to deal with the charge thereinafter mentioned according to the order of the Court, an order was made that the assets of the firm in or to come into the hands of the receiver should stand charged with the payment to the said Henry Sandell & Sons of the sum of 56*l.* 14*s.* 2*d.* due to them upon a final judgment obtained by them against R. Bristow & Sons on May 10, 1901, and of the sum of 58*l.* 12*s.* 2*d.* due to them upon a final judgment obtained by them against the said R. Bristow & Sons on May 13, 1901, with interest and costs.

On June 24, 1901, a similar order was obtained by J. P. Ridd charging the assets in or to come into the hands of the receiver with the payment to the said J. P. Ridd of the sum of 211*l.* 6*s.* due to him upon a final judgment obtained by him against R. Bristow & Sons on June 15, 1901.

On February 7, 1902, a similar order was obtained by Farquharson Brothers & Co. charging the assets in or to come into the hands of the receiver with the payment to the said Farquharson Brothers & Co. of the sum of 107*l.* 0*s.* 2*d.*, due to them on a final judgment obtained by them against R. Bristow & Sons on January 9, 1902.

This was a summons taken out by the solicitor employed by the plaintiff in the prosecution of the action, asking that it might be declared that he was entitled to a charge upon the assets of R. Bristow & Sons, represented by and being the 300*l.* cash in court and the 52*l.* 5*s.* in the hands of the receiver, and any further moneys coming to his hands as receiver, for the taxed costs, charges, and expenses of the applicant of or in reference to the action, and that such charge should constitute

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a first charge on the said assets, subject only to the payment of the receiver's remuneration and his solicitor's costs, and in priority to the above-mentioned charging orders.

Younger, K.C., and *T. Douglas*, for the applicant. This money in court and in the hands of the receiver has been "recovered or preserved" within the meaning of s. 28 of the Solicitors Act, 1860. But for this action there would have been no assets for any one. There is jurisdiction to make a charging order in favour of a solicitor as against creditors in a partnership action: *Jackson* v. *Smith*. (1)

The judgment creditors have obtained their charging orders upon the authority of *Kewney* v. *Attrill*. (2) Those orders do not override the right of the solicitor to a charge for his costs. The charge under the Solicitors Act, 1860, is on the property recovered or preserved, and not on the interest of any party. It is in the nature of salvage, and overrides the interests of all parties: *Greer* v. *Young* (3); *Scholey* v. *Peck*. (4)

Cecil Bovill, for Henry Sandell & Sons. If no receiver had been appointed, and the judgment creditor had obtained execution, the solicitor's lien would have been affected. Under the old practice the proper course would have been for the judgment creditor to apply in the action for the protection of his rights, notwithstanding the appointment of the receiver. The present equivalent for that relief is the obtaining of a charging order under *Kewney* v. *Attrill*. (2) In that case Kay J. said that the intention of the Court was to preserve to the applicants all the rights which they would have had if they had issued execution. If there had been no receiver the judgment creditor could have issued execution, and his rights ought not to be affected by the appointment of the receiver. Even in an administration action, before decree a judgment creditor could issue execution against the executor, and in such a case the solicitor's lien was to that extent affected: *Fowler* v. *Roberts*. (5) The solicitor's lien here attaches to the assets, less the amount of the charging orders.

(1) (1884) 53 L. J. (Ch.) 972.
(2) 34 Ch. D. 345.
(3) (1883) 24 Ch. D. 545.
(4) [1893] 1 Ch. 709.
(5) (1860) 2 Giff. 226.

Under s. 28 of the Solicitors Act, 1860, the "conveyances and acts done to defeat" the solicitor's charge must be conveyances or acts made or done by persons for whom the property is recovered or preserved. The section is directed against the person for whom the property is recovered or preserved, and not against any one claiming adversely to that person.

In *Jackson* v. *Smith* (1) the assets were realized for the benefit of all parties, and by the exertions of the solicitor. So far as concerns a creditor who has obtained a charging order, there is no salvage. The jurisdiction under the Solicitors Act is discretionary: *Ex parte Lloyd-George and George.* (2) This is not a case in which the Court will interfere in favour of the solicitor. [He also referred to *Hamer* v. *Giles.* (3)]

Clayton, for Farquharson Brothers & Co., adopted the argument of *C. Bovill*, and further referred to *Emden* v. *Carte.* (4)

T. Douglas, for J. P. Ridd.

Younger, K.C., in reply.

JOYCE J. In this case certain judgment creditors of the partnership have obtained orders in chambers which have been called charging orders, though they are not technically charging orders. They are orders following the case of *Kewney* v. *Attrill* (5), before Kay J., and by these orders the applicants undertook to deal with the charges thereinafter mentioned according to the order of the Court, and it was ordered that the assets of the firm of R. Bristow & Sons to come into the hands of the receiver should stand charged with the payment of the judgment debts. Now at that time, certainly at the date of the last of these orders, various assets had been got in, and the proceeds of those assets were either in the hands of the receiver or in court. In my opinion the effect of those orders, so far as the assets were concerned, was only to give a charge, or rather was not to give a charge otherwise than, subject to

(1) 53 L. J. (Ch.) 972.
(2) [1898] 1 Q. B. 520.
(3) (1879) 11 Ch. D. 942.
(4) (1881) 19 Ch. D. 311.
(5) 34 Ch. D. 345.

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any existing lien or existing prior charge. I very much doubt whether Kay J. intended in the original case of *Kewney* v. *Attrill* (1), or whether it has ever been intended when such orders as these have since been made, to give any charge except as among the creditors of the partnership themselves, or as against the several partners of the firm.

Then coming to the statute, it gives the Court power to charge property recovered or preserved with the payment of the costs, charges, and expenses of that preservation, and provides that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. It is quite settled, and it has been said over and over again, that this section must receive a liberal construction, and I think the decision of Romer J. in *Scholey* v. *Peck* (2) is really in accordance with the general line of authorities. Romer J. there says (3): "I have considered the cases cited in the course of the arguments and others bearing on charging orders obtained under the Solicitors Act, 1860. These authorities shew that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered. The 28th section of the Act is very general in its terms. It authorizes a charge not on the mere interest of the plaintiff, but on all property recovered in the action, whether for the plaintiff only, or for him in connection with others. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of *Greer* v. *Young*. (4) I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the plaintiff, but also against

(1) 34 Ch. D. 345.
(2) [1893] 1 Ch. 709.
(3) [1893] 1 Ch. 711.
(4) 24 Ch. D. 545.

the mortgagee, who is taking the benefit of the action, and over whose mortgage they must have priority."

It appears, therefore, to be settled that the charge under the Solicitors Act may be imposed not merely on the property of the particular client, but, if the property of other persons be preserved or recovered, it is imposed on their property or their interest. That it may be made as against creditors of a partnership appears by the case of *Jackson* v. *Smith*. (1) What the statute says is that all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a bonâ fide purchaser for value, be absolutely void. The persons who obtained these orders certainly were not purchasers before the orders were obtained; if they are purchasers at all, it is only by virtue of the orders. But they are not purchasers without notice, because the action was in existence, and in the case of *Cole* v. *Eley* (2), which was a decision of the present Master of the Rolls and Charles J., and was affirmed on appeal (3), it was held that the provision in s. 28 of the Solicitors Act, 1860, avoiding conveyances to defeat a charging order, "unless made to a bonâ fide purchaser for value without notice," means without notice of the solicitor's right to a lien, and not without notice of the existence of a charging order, and that the assignee of a judgment debt, being aware of the existence of the action, and that the solicitor was acting in it for the plaintiff, must be taken to have had notice of the solicitor's right to a lien on the property recovered in the action, and therefore was not a "purchaser for value without notice."

I hold that the persons who obtained these orders were not purchasers for value without notice within the meaning of the Act. Therefore I consider the solicitor's right to a lien takes priority over them all, and he is entitled to the common order.

Solicitors: *Harry Watkins; Smith & Hudson; Ward, Perks & McKay.*

(1) 53 L. J. (Ch.) 972. (2) [1894] 2 Q. B. 180.
(3) [1894] 2 Q. B. 350.

G. A. S.

JOYCE J. *In re* DUKE OF CLEVELAND'S SETTLED ESTATES.

1902

May 13, 14.

Settled Land Acts—Investment of Capital Moneys—Tenant for Life—Trustees—Right to choose Broker—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 2; *s.* 31.

Upon an investment of capital moneys arising under the Settled Land Acts, the tenant for life is not entitled to dictate to the trustees of the settlement as to what broker they shall employ in the matter. The trustees may select their broker as well as their solicitor.

THIS was a summons, taken out by the tenant for life of the estates settled by the will of the late Duke of Cleveland, against the trustees of the will, who were also trustees for the purposes of the Settled Land Acts and the Conveyancing and Law of Property Act, 1881. The question raised by the summons was whether, under the provisions of the Settled Land Acts, a tenant for life is entitled to direct the trustees, upon making investments of capital money arising under the Acts, to employ a particular broker chosen by himself. The trustees had in their hands for investment two sums of 25,000*l.* and 180,000*l.*, representing the proceeds of sale of a portion of the settled estates which had been sold by the tenant for life under his statutory power.

The tenant for life desired that a particular firm of stock-brokers, nominated by himself, should be employed to invest the capital moneys now in the hands of the trustees, and also all further sums of capital money which they might receive, in such authorized investments as he, the tenant for life, might select. He had consulted his brokers, and under their advice had selected certain securities, for the purchase of which he proposed to enter into contracts with them. The trustees desired that the investments should be made through their bankers, who in the ordinary course of business would employ their own brokers. The applicant asked, by the summons, that the trustees might be directed to apply the capital moneys in their hands in the purchase, through his brokers, or such other brokers of good credit and position as he might select, of

such investments authorized by the Acts as the applicant might direct.

Younger, K.C., and *Brinton*, for the applicant. The tenant for life in the exercise of his statutory power cannot be controlled by the trustees so long as he really and honestly exercises his discretion: *In re Lord Coleridge's Settlement* (1); *In re Llewellin*. (2) It is true that it has been held, in *In re Hotham* (3), that upon an investment upon mortgage in accordance with a direction by the tenant for life it is the duty of the trustees to satisfy themselves as to value, title, and form of the particular security, and Cozens-Hardy J. there said that his observations with respect to a mortgage would apply equally to any other investment under s. 21, sub-s. (i.); but an investment upon mortgage stands upon a different footing to an investment upon well-known stocks. A mortgage is not necessarily an authorized security because it is a mortgage. The *semble* in the head-note to *In re Hotham* (3) is inconsistent with the decision in *In re Lord Coleridge's Settlement*. (1) The tenant for life has a right to have the contracts which he proposes to enter into carried into effect. He is in the position of manager of the estates for the purposes of the Acts, and is entitled to employ any broker whom he chooses: Settled Land Act, 1882, ss. 21, 22, 31.

Hughes, K.C., and *E. Beaumont*, for the trustees, were not called upon.

JOYCE J. Generally speaking, if not universally, trustees in the execution of their trusts are entitled to choose the solicitor, the broker, and the banker that they will employ, or with whom they will deal. There is a well-known case, *Foster* v. *Elsley* (4), in which it was held by Chitty J. that trustees are not even bound to regard the direction of their testator as to what solicitor they shall employ.

I must observe in passing that, if there were any question of the tenant for life or the trustees or anybody else sharing in the

(1) [1895] 2 Ch. 704.
(2) (1887) 37 Ch. D. 317.
(3) [1901] 2 Ch. 790.
(4) (1881) 19 Ch. D. 518.

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brokerage that is to be made out of any transaction of investment, of course neither the tenant for life nor the trustees could be allowed directly or indirectly to participate in the benefit of that.

Now, turning to the Settled Land Act. The 22nd section provides that: "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly." And the 2nd clause of that section provides that: "The investment or other application by the trustees shall be made according to the direction of the tenant for life." That clause has been considered in various cases, and it was held in *In re Lord Coleridge's Settlement* (1) that the tenant for life was entitled to choose the security on which the investment should be made. But it was also decided in *In re Hotham* (2), which I must take to be the law at present, that in the case of an investment on a mortgage security where the trustees and the tenant for life act by different solicitors, it will rest with the solicitors for the trustees to do what is necessary with reference to the mortgage. That case is under appeal, but at present I shall follow it, and I am of opinion that the 2nd clause of s. 22 has not the effect, which is attributed to it by counsel for the applicant in this case, of enabling the tenant for life to select the broker to be employed any more than of enabling him to select the solicitor to be employed by the trustees.

But then there is s. 31, which provides that a tenant for life may enter into certain particular contracts; and, sub-s. 1 (v.), "may enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same." There was an obvious necessity for some such provision as that in the 1st sub-section of this 31st section; otherwise, if a tenant for life when he had exercised any powers under the Act should have died before the particular transaction was carried into effect and completed, all that had

(1) [1895] 2 Ch. 704. (2) [1901] 2 Ch. 790.

been done before would have come to nothing. Sub-s. 1 (vi.), provides that a tenant for life "may, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act." I do not know that the purposes of the Act are defined, but the Act is intituled "An Act for facilitating sales, leases, and other dispositions of settled land, and for promoting the execution of the improvements thereon." Now, this section does not say that the tenant for life may, in any other case, enter into a contract that the trustees or any other persons shall do any particular act or carry into effect any of the purposes of this Act, but it says that he may enter into a contract to do any act, and I think that the natural if not the necessary meaning of that section is that he may contract to do such things as he is by law entitled to do; and I am confirmed in that view by the next sub-section, which provides that "every contract shall be binding," not on the trustees or other people, but "on and shall enure for the benefit of the settled land, and shall be enforceable against"—not the trustees, but "against and by every successor in title for the time being of the tenant for life." I think that is naturally if not necessarily limited to acts which the tenant for life is himself entitled to do, and I do not think he can enter into a contract that the trustees shall do anything, and say that they are bound to do it.

In my opinion the trustees may select their own solicitors and their own broker. It has been said, I think by Lord Romilly, that trustees are liable for the default of their solicitor because they select him, and I agree with what Cozens-Hardy J. decided in *In re Hotham.* (1) I think this application must be refused.

Solicitors: *Jennings & Finch; Dawson, Bennett & Co.*

(1) [1901] 2 Ch. 790.

G. A. S.

SWINFEN EADY J.

1902

April 29, 30; *May* 1, 2, 14.

H. E. RANDALL, LIMITED *v.* THE BRITISH AND AMERICAN SHOE COMPANY.

[1902 H. 460.]

Company—Limited Company—Corporate Name—Trade Name—Separate User—Right to Protection—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 41, 42.

A limited company may acquire a right to protection of a trade name used separately from its corporate name, although such user is in contravention of ss. 41, 42 of the Companies Act, 1862.

Pearks, Gunston & Tee, Limited v. *Thompson, Talmey & Co.*, (1901) 18 Rep. Pat. Cas. 185, followed.

Wright v. *Horton*, (1887) 12 App. Cas. 371, applied.

WITNESS ACTION.

The plaintiffs were a limited company carrying on business as dealers in boots and shoes. In March, 1897, they opened a large shop in Regent Street for the sale of American shoes exclusively, and carried it on under the name of "The American Shoe Company" in order to distinguish it from their shops for English goods which were carried on under their corporate name, "H. E. Randall, Limited." They did not at first paint up their corporate name on the Regent Street shop, but shortly after the shop was opened their solicitor called their attention to the requirements of ss. 41, 42 of the Companies Act, 1862 (1),

(1) The Companies Act, 1862, provides as follows:—

Sect. 41: "Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company."

Sect. 42: "If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day

whereupon they painted their corporate name under their trade name of "The American Shoe Company," and on the eight other shops that they subsequently opened for the sale of American shoes they painted their corporate name under their trade name. Their corporate name had, however, in some instances been inadvertently omitted from their counter-checks and invoices, and, until recently, had usually been omitted in their advertisements.

The plaintiffs had obtained a very large reputation for their

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during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company."

Sect. 43: "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds: The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register."

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H. E. RANDALL, LIMITED v. BRITISH AND AMERICAN SHOE COMPANY.

American shoes in connection with their trade name, "The American Shoe Company."

The defendants having recently opened a small shop in Putney under the name of "The London American Shoe Company," which was subsequently changed to "The British and American Shoe Company," the plaintiffs brought this action to restrain the defendants from using either of those names, or any other name so nearly resembling the name of "The American Shoe Company" as to represent or lead to the belief that the defendants' business was a branch of or connected with that of the plaintiffs.

The defendants pleaded (inter alia) that the plaintiffs, having used their trade name apart from their corporate name, were precluded by ss. 41, 42 of the Companies Act, 1862, from acquiring any right to the protection of that trade name.

Vernon Smith, K.C., and *Gatey*, for the plaintiffs. Where a statute provides a specific penalty for a specific offence, the Court cannot add an additional penalty: *Wright* v. *Horton*. (1) That case decided that the omission to register a debenture under s. 43 of the Companies Act, 1862, did not invalidate the debenture. In the same way, breaches of ss. 41, 42 subject the plaintiffs to penalties, but do not deprive them of their right to protection of their trade name: *Pearks, Gunston & Tee, Limited* v. *Thompson, Talmey & Co.* (2)

Micklem, K.C., and *Wright Taylor*, for the defendants. In *Pearks, Gunston & Tee, Limited* v. *Thompson, Talmey & Co.* (2) the plaintiffs purchased the goodwill and trade name of "Talmey & Co.," and then carried on the business in that name alone in contravention of ss. 41, 42. It was held that they had not thereby forfeited their right to protection of a trade name lawfully acquired. In the present case the objection goes to the root of their title. The name, as a separate name, has been acquired by unlawful user, and the Court will not protect it: *Leather Cloth Co.* v. *American Leather Cloth Co.* (3)

(1) 12 App. Cas. 371.
(2) 18 Rep. Pat. Cas. 185.
(3) (1863) 4 D. J. & S. 137, 142; (1865) 11 H. L. C. 523.

The plaintiffs must be taken to have acquired their trade name in connection with their corporate name, H. E. Randall, Limited; in which case there can be no possibility of confusion with the defendants' name.

Cur. adv. vult.

May 14. SWINFEN EADY J., after holding that the plaintiffs had established their right to an injunction subject to the above point of law, continued:—The question remains whether the plaintiffs are precluded from obtaining relief by any breaches of ss. 41 and 42 of the Companies Act, 1862. Shortly after the plaintiffs commenced using the name "The American Shoe Company," their solicitor pointed out to them the obligations of the Companies Act, 1862, since which date they have kept painted up at all their places of business their corporate name, "H. E. Randall, Limited." One day last year, the same solicitor, when in their shop, happened to see a counter-check or invoice without their corporate name on it, and he drew their attention to the fact, and since that time their name, "H. E. Randall, Limited," has appeared thereon. Their corporate name has not usually until recently appeared on their advertisements. I am satisfied that the omissions have been made inadvertently. The question, however, is—Do these omissions preclude their right in this action to an injunction? Although at all shops of "The American Shoe Company" the words "H. E. Randall, Limited, Proprietors," have appeared conspicuously over the door for a considerable time past, they do not appear to have attracted much attention; and many persons were unaware that the plaintiffs were the proprietors of "The American Shoe Company." The argument addressed to me was that if the plaintiffs had bought an old business, and carried it on under the old name exactly without their own, they might have obtained protection for it; but as the plaintiffs did not purchase an existing business, but by their exertions have created and made famous the name, reputation and business of "The American Shoe Company," the latter have been unlawfully acquired and are not entitled to protection. I am of opinion that no such distinction can be established

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between a business bought and a business created and established. The Companies Act, 1862, ss. 41, 42, imposes certain penalties on a company for non-compliance with its provisions; but the additional penalty of forfeiting its goodwill to any dishonest person who chooses to steal it is not imposed by the statute.

In my opinion the present case is governed in principle by the decision of the House of Lords in *Wright* v. *Horton* (1), and in this respect I follow the recent decision of Farwell J. in *Pearks, Gunston & Tee, Limited* v. *Thompson, Talmey & Co.* (2)

Solicitors: *Ellis, Munday & Clarke; Alfred Syrett.*

(1) 12 App. Cas. 371. (2) 18 Rep. Pat. Cas. 185.

G. R. A.

FLEMING *v.* LOE.

C. A.
1902
July 15.

[1897 F. 1136.]

Vendor and Purchaser—Voidable Contract—Assignment of Contract—Privity of Contract—Money had and received, Action for.

A vendor having assigned the benefit of his contract for sale, payments were made, as under the contract, by the purchaser to the vendor's assignee. Subsequently to those payments the purchaser refused to complete the contract on the ground of misrepresentation by the vendor, and the assignee then brought an action for specific performance, making the vendor and the purchaser defendants, which action was dismissed.

A counter-claim by the purchaser to recover the payments made by him to the plaintiff was, upon the facts, dismissed with costs, the decision of Cozens-Hardy J., [1901] 2 Ch. 594, being reversed.

APPEAL by the plaintiff from the decision of Cozens-Hardy J. (1)

Eve, K.C., and *Martelli*, for the plaintiff, referred to *Aberaman Ironworks* v. *Wickens* (2) and *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3)

Upjohn, K.C., and *D. D. Robertson*, for the defendant Mackusick.

THE COURT (Vaughan Williams, Romer, and Stirling L.JJ.) reversed the decision of Cozens-Hardy J., and dismissed the defendant's counter-claim with costs, holding, upon the facts, that the moneys paid to the plaintiff, Loe's assignee, had been duly appropriated by him to the purposes for which, under the contract, they were paid and intended by the defendant, and therefore could not now be recovered from the plaintiff.

Solicitors: *Morten, Cutler & Co.; Last & Sons.*

(1) [1901] 2 Ch. 594. (2) (1868) L.R. 5 Eq. 485; 4 Ch. 101.
(3) [1902] 1 Ch. 146.

G. I. F. C.

C. A.
1902
March 17, 18, 24, 25; April 29.

In re HOLLAND.
GREGG *v.* HOLLAND.

[1900 H. 3732.]

*Fraudulent Conveyance—Voluntary Settlement—Intention to defeat or delay Creditors—Inference of Intent—Protection of Creditors—Post-nuptial Settlement—Recital of Ante-nuptial Parol Agreement—"Memorandum or Note" in writing—Parties—Estoppel—Wife's Chose in Action—Husband's Interest determinable on Bankruptcy—Bankruptcy of Settlor—Trustee in Bankruptcy, Title of—Evidence—Admissibility of Recital—*13 *Eliz. c.* 5—*Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

By a post-nuptial settlement dated in 1873, to which the testamentary guardians of the wife, then an infant, were parties, after a recital that previously to the marriage the husband agreed to make such settlement of his wife's fortune as was thereinafter contained, it was witnessed that the husband, being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he and his wife would assign it to the trustees on the usual trusts for the wife, husband, and issue of the marriage, the husband's life interest being determinable on bankruptcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. In 1877 the wife died. In 1898 the husband was adjudicated bankrupt. In 1899 the fund fell into possession. There was issue of the marriage:—

Held, reversing the decision of Farwell J., [1901] 2 Ch. 145, that the settlement was good against the trustee in bankruptcy, on the grounds (1.) that there was no evidence of its having been made with intent to defeat creditors so as to render it void under the statute 13 Eliz. c. 5, and no such intent ought, in the circumstances, to be inferred; and (2.) that the deed was not voluntary but, taken as a whole, constituted such a note or memorandum of the recited parol ante-nuptial contract in consideration of marriage as satisfied the Statute of Frauds (29 Car. 2, c. 3), s. 4, and enabled the contract to be enforced both against the settlor who signed it and against his trustee in bankruptcy, the recital of the contract being admissible in evidence as against the trustee setting up the statute.

But whether the husband's life interest passed to the trustee in bankruptcy, *quære*.

In re Pearson, (1876) 3 Ch. D. 807, overruled.

Barkworth v. *Young*, (1856) 4 Drew. 1, approved.

Appeal from Farwell J. (1)

Under the will of Henry Holland, dated April 26, 1871,

(1) [1901] 2 Ch. 145.

his daughter, Charlotte Fanny Holland, then an infant, on attaining twenty-one or marrying, was entitled in remainder expectant on the death of the testator's widow to one-eighth share of the proceeds of sale of his residuary real and personal estate. The testator died on December 12, 1871. On August 27, 1872, Charlotte Fanny Holland intermarried with Dr. Isidore M. Bourke. On February 8, 1873, a post-nuptial settlement was executed by deed made between Isidore M. Bourke and Charlotte Fanny, his wife, then still an infant, of the first part, the testator's widow and the three executors and trustees of his will, all four persons being the testamentary guardians of Mrs. Bourke, of the second part, and the three trustees of the settlement of the third part. This deed contained the following recital: "And whereas the said parties hereto of the first part intermarried on the 27th day of August, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained"; and it was witnessed that "in pursuance of such agreement and in consideration of the said marriage" the husband thereby for himself and his wife, "and with the approbation of the said parties hereto of the second part as such guardians as aforesaid," covenanted with the trustees of the settlement that immediately upon the share and interest of and in the residuary estate and effects of the said Henry Holland, to which the husband and wife or the husband in her right or either of them then were or was or thereafter might become entitled, becoming an interest in possession, the husband and wife or the survivor of them, and all other necessary parties, if any, would assign or transfer the said share and interest to such trustees, who were to stand possessed thereof upon trust to pay the income to the wife for life for her separate use without power of anticipation, and after her death, "if the said Isidore M. Bourke shall survive her and shall not be outlawed or have been or become a bankrupt . . . . and shall not have assigned, charged, or incumbered, or attempted or affected to assign or incumber, the said dividends, interest, and income or any part thereof, or have done or suffered anything whereby the same or any part

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thereof would, through his act or default or by operation or process of law or otherwise, if belonging absolutely to him, have become vested in or payable to some other person or persons, pay the same dividends and income to the said Isidore M. Bourke during his life or until he shall be outlawed or become a bankrupt," &c. (repeating the above words), and after the death of the wife, and the failure or determination of the trust thereinbefore declared in favour of the husband, in trust, as to the capital, for the children or other issue of the marriage as the husband and wife should by deed appoint, and, failing such joint appointment, as the survivor should by deed or will appoint, and in default of such appointment, in trust for the children of the marriage who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry under that age with the consent of their guardians, in equal shares, with the usual hotchpot clause.

On April 14, 1877, the wife, who had attained the age of twenty-three, died intestate, leaving her husband and three sons her surviving. The joint power of appointment was not exercised.

On October 25, 1897, the husband appointed two-thirds of the trust funds to two of his sons, and surrendered to them his life interest in those two-thirds.

On March 1, 1898, a receiving order was made against the husband, and on March 18, 1898, he was adjudicated bankrupt, the official receiver being his trustee.

On December 11, 1899, the testator's widow died, and the fund fell into possession.

This was an originating summons taken out by the trustees of the will of Henry Holland against the present trustees of the above settlement and the beneficiaries claiming thereunder, and also against the official receiver of the estate of the bankrupt, Isidore M. Bourke, to have it determined who were the persons entitled to Mrs. Bourke's share of the testator's residuary personal estate.

There was no evidence whatever that at the date of the settlement Dr. Bourke, who was a medical man, owed any debts or contemplated giving up his profession and embarking in trade.

In delivering a considered judgment Farwell J. held (1) that as against the official receiver the settlement was void in toto, and that on his taking out administration to Mrs. Bourke's estate he would be entitled to the fund representing her share of the testator's residuary personal estate.

The defendants, the trustees of the settlement and the beneficiaries thereunder, appealed.

The appeal was heard on March 17, 18, 24, and 25.

Herbert Reed, K.C., and *A. St. John Clerke*, for the trustees and beneficiaries claiming under the settlement. The question is whether this fund is to be deemed to have been the husband's property. If so, we admit he could not settle it so as to defeat his creditors. But the fund was not his property: it did not by his marriage vest in him, and could not do so unless he reduced it into possession during the coverture; any assignment he made before reduction into possession would have been invalid against the wife. She could, if necessary, have enforced her equity to a settlement. Then what was the effect of this settlement? First, it is said that the settlement is a voluntary settlement by the husband, and therefore void under the statute 13 Eliz. c. 5, as being intended to defeat or delay creditors. But, in the first place, this settlement is not voluntary at all, for the husband, in pursuance of an agreement made before the marriage, and in consideration of which the marriage took place, covenanted what he would do on a certain future event; and that covenant is one that can be enforced notwithstanding that the settlement rests, as we admit, in fieri. How, then, is this settlement void as against the husband's creditors? The learned judge below has held, on the sole authority of *In re Pearson* (2), that, although the husband was not at the date of the settlement engaged in, or contemplating embarking in, any hazardous business, and was not indebted, yet the settlement was void in toto as against the trustee in bankruptcy. But that case cannot be regarded as one of general application and, we submit, does not cover the present case. In that case the settlement was a purely

(1) [1901] 2 Ch. 145. (2) 3 Ch. D. 807.

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voluntary one of the husband's own property, not the wife's. A distinction has always been drawn between a settlement of a husband's own property so as to go over on his bankruptcy, and a settlement of a wife's property so as to go over on the same event; in the former case the settlement is void as against the husband's creditors, but in the latter it is good: *Higinbotham* v. *Holme*. (1) So, where a husband has received a fortune in right of his wife, he may settle it with a defeasance clause in the event of his own bankruptcy, the settlement being regarded as that of her property, not of his: *Macintosh* v. *Pogose* (2); *Montefiore* v. *Behrens*. (3) In the present case, the wife did not repudiate the settlement on coming of age.

[COZENS-HARDY L.J. There was no occasion for her then doing anything either in the way of repudiation or confirmation, for the fund was not in possession.]

The husband, by covenanting with the trustees that the fund, when it fell into possession, should be placed in their hands in trust for his wife and children, disabled himself from consenting to a sale by the wife of her reversionary interest under Malins' Act (20 & 21 Vict. c. 57). *In re Pearson* (4) is the only reported case which has gone the length of deciding that the mere fact of a settlement containing a defeasance clause such as we have here avoids the entire settlement; and it is contrary to the numerous cases, all collected in *Macintosh* v. *Pogose* (5), which shew that a settlement containing such a clause may be void only in part. Assuming the settlement is not void altogether, we submit that the effect of the husband's appointment in 1897, that is, before his bankruptcy, was to cause a defeasance of the life interest he had then become entitled to, and so to divert the fund from his trustee in bankruptcy: *In re Detmold* (6); *Brooke* v. *Pearson* (7); *Knight* v. *Browne*. (8) *In re Pearson* (4) was cited in *In re Detmold* (6), but not for the larger proposition that the entire settlement was void, and that larger question was not in fact discussed.

(1) (1812) 19 Ves. 88, 92; 12 R. R. 146.
(2) [1895] 1 Ch. 505, 511–2.
(3) (1865) L. R. 1 Eq. 171.
(4) 3 Ch. D. 807.
(5) [1895] 1 Ch. 505.
(6) (1889) 40 Ch. D. 585.
(7) (1859) 27 Beav. 181.
(8) (1861) 9 W. R. 515.

If *In re Pearson* (1) had been a correct decision, the settlement in *In re Brewer's Settlement* (2) would similarly have been held void in toto, whereas it was held that it was only void as regarded the limitation of the settlor's interest until bankruptcy.

[VAUGHAN WILLIAMS L.J. The question we have to consider in the present case is—Was there an intention to "delay, hinder, or defraud creditors" within the statute 13 Eliz. c. 5 ?]

Whether there is an "intent" to defraud is the main consideration in such cases: *In re Tetley* (3); *Thompson* v. *Webster* (4); *Spirett* v. *Willows* (5); *Freeman* v. *Pope* (6); *Ex parte Mercer* (7); *In re Lane-Fox.* (8) There is an entire absence of any evidence here that the husband was in debt at the date of the settlement, so as to support an inference of "intent"; nor is "intent" to be inferred from the fact that the necessary consequence of what he did was to defeat and delay his creditors. The latter proposition, though supported by dicta of eminent judges, was characterised by Lord Esher M.R. in *Ex parte Mercer* (9) as "monstrous." We submit, therefore, that the case does not fall within the statute 13 Eliz. c. 5.

Then the next question is one arising on the Statute of Frauds (29 Car. 2, c. 3), whether the recital in the settlement is good evidence of an ante-nuptial agreement, and a sufficient "memorandum thereof in writing" to satisfy s. 4 of that statute. We submit that it is: *Hodgson* v. *Hutchenson.* (10)

[*Upjohn, K.C.* From the record of that case, when examined, it appears that there was a further consideration *after* the marriage.]

In *Codrington* v. *Lindsay* (11) Lord Selborne held that such a recital was good evidence of an ante-nuptial contract binding on the husband and on the other parties to the deed that contained the recital. And the same doctrine was applied by Buckley J. in *Buckland* v. *Buckland.* (12) The settlement

(1) 3 Ch. D. 807.
(2) [1896] 2 Ch. 503.
(3) (1896) 3 Manson, 226.
(4) (1859) 4 Drew. 628.
(5) (1864) 3 D. J. & S. 293.
(6) (1870) L. R. 5 Ch. 538.
(7) (1886) 17 Q. B. D. 290.
(8) [1900] 2 Q. B. 508.
(9) 17 Q. B. D. 298.
(10) (1712) 5 Vin. Abr. 522, pl. 34.
(11) (1872) L. R. 8 Ch. 578, 588.
(12) [1900] 2 Ch. 534.

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having been for value given by the wife, namely, the consideration of marriage, and she having certainly no intention of conniving with her husband to defraud creditors, it is really immaterial whether the recital that there had been an ante-nuptial agreement was true or not: *Kevan* v. *Crawford.* (1) The husband, having executed a deed containing an express declaration or recital of an ante-nuptial agreement, would himself be estopped from denying the settlement, and his trustee in bankruptcy is equally bound by estoppel, since he cannot assert any higher right than the bankrupt himself had: *Harris* v. *Truman.* (2) The burden of proof that this settlement is voluntary and not made for valuable consideration rests upon those who set up that contention, and not upon the beneficiaries who are resisting it.

Upjohn, K.C., and *Alfred Adams*, for the official receiver.

[VAUGHAN WILLIAMS L.J. We wish you to deal, first of all, with *In re Pearson.* (3)]

If the present case falls within that authority, it is unnecessary to discuss the effect of the recital, because the settlement is void in toto. Apart from that authority, it is of the utmost importance to establish that a settlement, whether by an assignment or a covenant to assign, and whether made on marriage or not, cannot be rendered valid as against the settlor's trustee in bankruptcy by the mere insertion of a recital.

[VAUGHAN WILLIAMS L.J. The question is whether, there being no evidence of intention *in fact* at the date of this settlement to defeat or delay creditors, the decision in *In re Pearson* (3)—in which case also there was no such intention at the time—was right or not. That is a crucial question going to the whole matter.]

The ground of that decision was this, that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors. He cannot say, "I may become bankrupt, and therefore I will settle my property in such a way that my creditors will not be able to touch it." If he

(1) (1877) 6 Ch. D. 29, 38–9. (2) (1882) 9 Q. B. D. 264.
(3) 3 Ch. D. 807.

does so settle it, whether by assignment or covenant, that itself shews the intent: it is done "for the purpose" of delaying creditors within the meaning of the statute. To render a voluntary settlement void under the statute, it is not necessary to shew that the settlor contemplated becoming actually indebted: it is sufficient if he contemplated the possibility of bankruptcy or insolvency: *Mackay* v. *Douglas.* (1)

The decision in *In re Pearson* (2) is now over twenty-five years old, and has never been questioned; and it was treated as good law by North J. in *In re Detmold.* (3) That latter case was one of a marriage settlement; and so also was *Higinbotham* v. *Holme.* (4) You require a stronger case to shew that a settlement made before and in consideration of marriage was made with intent to defeat creditors, than where a settlement is a voluntary settlement made after marriage. The proviso in this voluntary settlement for cesser of the settlor's life interest on bankruptcy is enough to lead to the inference of an intent to defeat creditors. One of the first cases shewing that an ante-nuptial settlement may be void as against creditors is *Colombine* v. *Penhall.* (5)

[COZENS-HARDY L.J. Why should the insertion of a cesser clause in the case of the husband's life interest make void so much of the settlement as would otherwise be good?]

Because the object and intent of the entire settlement are to defeat creditors. The authorities all make a distinction between a settlement made before and in consideration of marriage and a purely voluntary settlement. An ante-nuptial settlement involves the consideration of marriage, but under a post-nuptial settlement the wife and children are mere volunteers.

In *In re Detmold* (3) the question whether the settlement was void in toto was not discussed.

[COZENS-HARDY L.J. The only question raised by the summons in *In re Detmold* (3) was whether the cesser clause on the husband's life interest was void. It was unnecessary, therefore, to discuss the larger question.]

(1) (1872) L. R. 14 Eq. 106.
(2) 3 Ch. D. 807.
(3) 40 Ch. D. 585.
(4) 19 Ves. 88; 12 R. R. 146.
(5) (1853) 1 Sm. & Giff. 228.

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In *In re Brewer's Settlement* (1), *In re Detmold* (2) was cited, but not *In re Pearson.* (3)

[COZENS-HARDY L.J. There, again, the question raised by the summons was only as to the effect of the cesser clause on the life interest, and not as to the validity of the whole settlement.]

In *Macintosh* v. *Pogose* (4) the wife, having separate property, was married after the Married Women's Property Act, 1882, so that the property settled was hers and not her husband's, and it was held that the settlement was valid as against his trustee in bankruptcy as having been made in good faith and for valuable consideration; the present question therefore did not arise.

As to *Ex parte Mercer* (5), that case went entirely upon the facts. (6) Notwithstanding the recital, this deed is a voluntary deed: it rests in fieri and does not pass the fund: it is merely a covenant to do something in the future, and the Court will not enforce it at the instance of volunteers: *Ellison* v. *Ellison.* (7) Therefore the only right of the trustees and beneficiaries is to come in and prove in the bankruptcy. If a trustee in bankruptcy is bound by a recital of this kind, it opens the door to any bankrupt settlor to evade s. 47 of the Bankruptcy Act, 1883, altogether: *Battersbee* v. *Farrington.* (8)

[VAUGHAN WILLIAMS L.J. The first sentences of Sir Thomas Plumer's judgment in that case are against you, for he says that a voluntary conveyance by a person not indebted at the date of the deed is clearly good against future creditors.]

We are relying now upon that part of the judgment in which he says it is difficult to maintain that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, is binding on creditors.

The question whether the settlement was voluntary must be considered with reference to the state of things existing immediately before it was executed. If consideration was

(1) [1896] 2 Ch. 503.
(2) 40 Ch. D. 585.
(3) 3 Ch. D. 807.
(4) [1895] 1 Ch. 505.
(5) 17 Q. B. D. 290.
(6) 17 Q. B. D. 299.
(7) (1802) 6 Ves. 656; 6 R. R. 19.
(8) (1818) 1 Swans. 106, 113; 18 R. R. 32.

given for it, of course it was not voluntary. If there was an ante-nuptial agreement, it is not suggested that there was any memorandum of it before the deed was executed. If there was an ante-nuptial agreement which could not be enforced by reason of there being no memorandum of it in writing, the execution of a deed in pursuance of it was voluntary. A memorandum of the agreement after the marriage is of no avail; and if such a memorandum could be sufficient, the recital in this deed does not satisfy the requirements of the Statute of Frauds, for it does not state the nature of the agreement, the names of the parties, or the consideration: *Spurgeon* v. *Collier* (1); *Warden* v. *Jones* (2); *Randall* v. *Morgan* (3); *Trowell* v. *Shenton* (4); Sugden on Powers, 8th ed. pp. 647 et seq. If in *Dundas* v. *Dutens* (5) Lord Thurlow did really decide that the recital of ante-nuptial agreement in a post-nuptial settlement is sufficient to satisfy the Statute of Frauds, this is contrary to all the other decisions on the point.

Shaw v. *Jakeman* (6) does not apply to a case like the present, since in that case there were written articles before marriage. The authorities upon the question whether a settlement, after marriage, reciting a parol agreement before marriage, is binding against creditors of the settlor, are, as Farwell J. pointed out, conflicting, there being dicta both ways. Those dicta all relate back to *Hodgson* v. *Hutchenson* (7), the report of which is not quite intelligible. There appears to have been no agreement before marriage at all, nor indeed after marriage: there was nothing more than a "proposal" or offer by a letter written after the marriage. The case is no authority upon the point whether an agreement which at the date of the marriage is in parol only becomes enforceable by reason of its being reduced into writing after the marriage. The various dicta are to be found in *Montacute* v. *Maxwell* (8); *Taylor* v.

(1) (1758) 1 Eden, 55, 61.
(2) (1857) 2 De G. & J. 76, 85.
(3) (1805) 12 Ves. 67; 8 R. R. 289.
(4) (1878) 8 Ch. D. 318.
(5) (1790) 1 Ves. Jr. 196; 2 Cox, 235; 1 R. R. 112.
(6) (1803) 4 East, 201.
(7) 5 Vin. Abr. 522, pl. 34.
(8) (1719) 5 Vin. Abr. 522, pl. 36; 1 Eq. C. Ab. 19, pl. 4; 1 Str. 236; 1 P. Wms. 618.

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Beech (1); *Dundas* v. *Dutens* (2); *Spurgeon* v. *Collier* (3); *Randall* v. *Morgan* (4); *Warden* v. *Jones* (5); *De Beil* v. *Thomson* (6); *Lassence* v. *Tierney* (7); *Surcome* v. *Pinniger* (8); and *Barkworth* v. *Young* (9), the judgment of Kindersley V.-C. in which case is criticised and disapproved of by Farwell J. in the present case. The deduction from these authorities seems to be that a parol agreement before marriage, followed by marriage alone, does not satisfy the Statute of Frauds, there being no part performance independently of the marriage.

[VAUGHAN WILLIAMS L.J. referred to *Cookes* v. *Mascall* (10), *Bird* v. *Blosse* (11), and *Moore* v. *Hart.* (12)]

We submit, therefore, that this settlement does not satisfy the statute. The official receiver is not bound by any estoppel. It would be dangerous to hold that a deed with such a recital as this, signed by a debtor, should be an estoppel as against his creditors. We submit that the official receiver, as representing the creditors, is entitled to all the rights of the creditors under the statute of Elizabeth. It is now settled that a recital creates no estoppel: *Onward Building Society* v. *Smithson.* (13) The doctrine of a wife's equity to a settlement does not apply here, because Mrs. Bourke died before the property came into possession. In any event, the official receiver must be entitled to Dr. Bourke's life interest.

W. H. Cozens-Hardy, for the trustees of the will.

A. St. John Clerke, in reply. *In re Pearson* (14), upon which Farwell decided the present case, stands alone, and is inconsistent with *Montefiore* v. *Behrens.* (15) In May on Voluntary Settlements, 2nd ed. p. 68, it is pointed out that the decision in *In re Pearson* (14) proceeded on the ground that the settlement was in reality a sham, by reserving to the settlor the first

(1) (1749) 1 Ves. Sen. 297.
(2) 1 Ves. Jr. 196; 2 Cox, 235; 1 R. R. 112.
(3) 1 Eden, 55, 57, 62, n.
(4) 12 Ves. 67, 74; 8 R. R. 289.
(5) 2 De G. & J. 76.
(6) (1841) 3 Beav. 469; note to *Hammersley* v. *De Biel*, (1845) 12 Cl. & F. 45, 61, n.
(7) (1849) 1 Mac. & G. 551, 571-2.
(8) (1853) 3 D. M. & G. 571.
(9) 4 Drew. 1.
(10) (1690) 1 Eq. C. Ab. 22-3, pl. 18; 2 Vern. 200, 201.
(11) (1683) 1 Eq. C. Ab. 22, pl. 16; 2 Vent. 361.
(12) (1683) 1 Vern. 201.
(13) [1893] 1 Ch. 1.
(14) 3 Ch. D. 807.
(15) L. R. 1 Eq. 171.

life interest, determinable on bankruptcy; whereas, if the trusts had been solely or primarily for the benefit of his wife and children, as the husband was not then contemplating going into trade, the settlement would probably have been considered valid. In the present case the primary object was clearly to make provision for the wife and children, the wife taking the first life interest.

The cases cited on the other side were cases in which the rights of creditors were concerned, not the rights of cestuis que trust coming to enforce a settlement against the settlor.

Barkworth v. *Young* (1) shews the efficacy of a written memorandum subsequent to the marriage to establish a parol contract made prior to and in consideration of the marriage; and there is no authority the other way.

Cur. adv. vult.

April 29. VAUGHAN WILLIAMS L.J. (after stating the facts). The fund is claimed by the trustees and beneficiaries under the settlement of February 8, 1873, and their claim is resisted by the official receiver as trustee of Isidore M. Bourke.

It is conceded by the learned counsel for the trustees and beneficiaries that the settlement rests in fieri, and cannot be enforced unless it can be supported by the consideration of marriage, and he relies on the recital of an ante-nuptial contract.

Now, as I understand, the official receiver shapes his case in two ways. First, he says that the covenant is void as being a fraudulent conveyance or alienation within the statute 13 Eliz. c. 5. Secondly, he says that, even assuming that the settlement is not fraudulent within the statute, yet the settlement is a voluntary settlement resting in fieri, of which a Court of Equity would not grant specific performance; and that, therefore, the only right of the trustees and beneficiaries under the marriage settlement is to come in and prove with the other creditors.

Now, as to the first point, Farwell J. has decided, on the authority of the case of *In re Pearson* (2), that, having regard to the fact that Dr. Bourke was, at the date of the execution

(1) 4 Drew. 1. (2) 3 Ch. D. 807.

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of the post-nuptial settlement, entitled jure mariti to the property the subject of the settlement, the fact that the settlement contains a clause providing that his beneficial interest should continue until he should become a bankrupt, or assign, or attempt or affect to assign, is conclusive to make the settlement fraudulent within the statute of Elizabeth.

I agree that this is the effect of the decision in the case of *In re Pearson* (1), and the Court's decision bound Farwell J.; but the decision does not bind us, and I shall therefore consider whether or not it was right. I do not think that the decision in *In re Pearson* (1) is right. I think that in each case you must look at the whole of the circumstances surrounding the execution of the conveyance, and then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors: *Ex parte Mercer.* (2) In my judgment, in the present case one ought not, on the evidence before us (even excluding the recital of the ante-nuptial promise), to find such intent.

The property the subject of the settlement had been reversionary property in the right of the wife, and only came to the husband in her right. Under these circumstances it was right and proper that the husband should make some settlement, and the settlement which he in fact did make seems to me to have been a right and proper settlement for the husband to make of property coming to him in the right of his wife, provided only he was not, at the time of the execution of the settlement, unable to pay his creditors, or contemplating entering upon or continuing in a business of such a speculative nature as to be likely to land him in financial embarrassments.

In the present case the settlement gives to the wife a first life interest, and then to the husband, if he survives the wife, but not otherwise, a life interest until he should become bankrupt, or should assign or incumber, or attempt to assign or incumber, his life interest; and after the failure and determination of the trusts declared in favour of the husband the trustees were to stand possessed of the trust premises in trust for the children as the parents or their survivor might appoint.

(1) 3 Ch. D. 807. (2) 17 Q. B. D. 290.

I cannot draw the inference that this settlement was fraudulent, or made with intent to defeat or delay creditors, in the absence of evidence of either indebtedness by the husband at the date of the settlement, or of an intention by the husband at the date of the settlement to enter upon a speculative business likely to result in insolvency.

There is no such evidence, and I have no reason to doubt but that, as a fact, the husband had no intention of defeating or delaying creditors, but only intended to reserve to himself, out of the property coming to him in the right of his wife, such an interest as after her death he could receive without prejudice to the welfare of her children: as long as he could so receive it he was to do so, but no longer. Suppose that the husband, being perfectly solvent and not contemplating a speculative business, had settled the whole of his property coming to him in the right of his wife on his wife for life, and after her death in trust for her children—would it have been possible to have drawn the inference that such a settlement was intended to defeat and delay creditors? If not, why is one to infer fraud because the husband gives himself a life interest so long as he can receive the income of the money coming to him in right of the mother without prejudice to the welfare of her children? I decline to draw any such inference.

The case of *Montefiore* v. *Behrens* (1), although it differs from the present case in that the wife's property was in possession and not in reversion, is yet an authority that the settlement by the husband of property coming to him in right of his wife is not made fraudulent by a clause making the husband's life estate thereunder determinable on his bankruptcy.

It seems to me that the case of *Middlecome* v. *Marlow* (2) goes far to shew that, in the opinion of Lord Hardwicke, a post-nuptial settlement by a husband of property coming to him in right of his wife is primâ facie good, where there is no proof of his being indebted at the time and it is upon such consideration as to prevail against creditors; and it is to be observed that the settlement was held not to be fraudulent within the meaning of 13 Eliz., although it contained a proviso

(1) L. R. 1 Eq. 171; 35 Beav. 95. (2) (1742) 2 Atk. 519.

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empowering the trustee to lend a part or the whole to the husband. The trustee lent the husband the whole, and fourteen months afterwards the husband became a bankrupt. The trustee then filed his bill to be admitted a creditor. Lord Hardwicke decreed that he should come in as a creditor under the commission for the money he paid to the husband. If the money settled had not come to the husband in the right of his wife, I cannot but think that the decision would have been different. Lord Hardwicke distinctly founds his decision on the money having come to the husband in right of his wife, and on the deed doing no more than the Court would have done in a case where the husband had no estate of his own to settle.

Now, as to the other point—namely, as to the Statute of Frauds—and the effect, if any, of the recital in the deed of the ante-nuptial contract. The recital runs thus: "And whereas the said parties hereto of the first part intermarried on the 27th day of August, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained." I propose, as there seems to be some little conflict in the authorities, or rather the dicta, to examine the reason of the matter. It will be observed that the husband and—the wife still being an infant—the mother of the infant and the other three guardians of the infant, those three being also the trustees and executors of the father's will, are all parties to the settlement.

The recital in the deed of the ante-nuptial contract, it is true, only recites the ante-nuptial agreement, and does not in terms state who were the parties to the agreement, but I think that it means, upon a reasonable construction, an agreement with Miss Holland and her guardians: see *Codrington* v. *Lindsay*. (1) Now, if this is the parol agreement recited, the recital, if contained in a writing outside the deed of settlement, would be a sufficient writing to satisfy the 4th section of the Statute of Frauds; but it is said that the recital in the settlement is not enough to satisfy the statute. I confess I cannot understand this.

(1) L. R. 8 Ch. 578.

The recital is not the agreement to settle: it is evidence of a fact, and that fact is an agreement made antecedently to the marriage. Suppose the settlement had contained no recital, and the trustees had brought an action for specific performance, and had alleged that the agreement, to enforce which they were bringing their action, was an agreement made in pursuance of an antecedent agreement, it would have been sufficient if the plaintiff had produced at the trial a memorandum in writing of the contract signed by the party to be charged therewith, though none existed at the time of making the contract, provided only it must have been a memorandum signed before the commencement of the action. The Statute of Frauds does not deal with the validity of the agreement: *Maddison* v. *Alderson* (1); it deals only with the evidence to prove the agreement, the statute requiring that the agreement shall be evidenced by a writing signed by the party thereto against whom the action is sought to be enforced. There is no difference, so far as I know, between an agreement in consideration of marriage and any other agreement within the 4th section of the Statute of Frauds. It cannot be doubted but that if there were a parol agreement to answer the debt, default, or miscarriage of another, and an action were brought on such agreement, and the plaintiff produced a memorandum of the agreement signed by the defendant just before action brought, the plaintiff would succeed.

Upon the reason of the thing, I think the recital gets over any objection based on the Statute of Frauds; and I do not conceive that we can give any effect to the argument that it would be to open a door to frauds on creditors to give this effect to a recital of an ante-nuptial agreement. No doubt, the fact that the agreement is first mentioned in a recital in a post-nuptial agreement is an element to be taken into consideration in considering whether the deed is fraudulent, and, coupled with other circumstances, it may prove the fraud; but this, to my mind, does not touch the question on the Statute of Frauds.

In my judgment, the Court ought not to say that a post-

(1) (1883) 8 App. Cas. 467.

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nuptial agreement is voluntary if there is written evidence sufficient to satisfy the Statute of Frauds of an ante-nuptial agreement having been made for a good consideration before the marriage and in consideration of the marriage; and this, in my opinion, is the case here, the only difficulty being on the question whether the agreement acknowledged by the recital sufficiently indicates the parties to the agreement, which, however, I think it does.

Having thus dealt with the question apart from authority, I will now deal with the authorities. Farwell J. calls attention in his judgment to three cases which, in his opinion, shew that the decision of Kindersley V.-C. in *Barkworth* v. *Young* (1)—which is a direct authority that a memorandum, though written after the marriage, stating an ante-nuptial oral agreement, is a sufficient memorandum within s. 4 of the Statute of Frauds—cannot be supported. The three cases to which the learned judge refers are *Spurgeon* v. *Collier* (2), *Warden* v. *Jones* (3), and *Trowell* v. *Shenton.* (4)

Now, with regard to the case of *Spurgeon* v. *Collier* (2), the Lord Keeper Northington came to the conclusion that the proof of a parol promise before marriage failed, and the opinion expressed by the Lord Keeper that, even if such promise had been proved to have existed, it would not have supported a settlement made after marriage, was not necessary for the decision of the case. The case had nothing to do with creditors, the plaintiff not claiming through Collier but against him; and the question was whether the rights of the plaintiff against Collier in respect of the Hillingdon estate were to be defeated by an alleged purchase for value by some defendants named Alston to whom Collier purported to convey in consideration of marriage. There was no recital of an ante-nuptial agreement, and the Court held that the attempted proof of an ante-nuptial agreement failed in fact, and consequently that the deed was voluntary. The recital would not even have been evidence against the plaintiff.

Next comes the case of *Warden* v. *Jones.* (3) That case does not seem to me to be an authority for the general pro-

(1) 4 Drew. 1.
(2) 1 Eden, 55.
(3) 2 De G. & J. 76.
(4) 8 Ch. D. 318.

position that a post-nuptial settlement, reciting that it was made in pursuance of an ante-nuptial agreement, cannot be good. In the first place, in *Warden* v. *Jones* (1) there was no recital of such an ante-nuptial agreement; and although Lord Cranworth may have expressed the opinion that, assuming the existence of an antecedent parol agreement, it was not sufficient to satisfy the statute so as to give consideration to the settlement made after the marriage in pursuance of such agreement, this is a very different thing from deciding that the settlement would have been void against creditors if it had contained such a recital. As to this, Lord Cranworth only says: "I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void against creditors." It will be observed that in *Warden* v. *Jones* (1) the circumstances of the husband at the date of the settlement of the wife's property were such as to afford cogent evidence that he in fact executed the settlement with the intent to defeat and delay creditors.

Next as to the case of *Trowell* v. *Shenton*. (2) This was a case in which it was held that an ante-nuptial agreement by an infant is not sufficient to take a post-nuptial settlement, in which no reference is made to the ante-nuptial agreement, out of the operation of 27 Eliz. c. 4, and that such post-nuptial settlement is therefore void against a subsequent purchaser for value. No doubt in that case Jessel M.R. does express his opinion that Lord Cranworth was right when he said in *Warden* v. *Jones* (1)—referring to a decision of Lord Thurlow in *Dundas* v. *Dutens* (3) that a post-nuptial settlement, wherein the parties recited an agreement before marriage, is not within the statute —"On that decision I will only remark, that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing, that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid."

(1) 2 De G. & J. 76, 85, 86.
(2) 8 Ch. D. 318.
(3) 2 Cox, 235; 1 Ves. Jr. 196; 1 R. R. 112.

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It will be observed that the observations of Sir George Jessel were not necessary to the decision of the case. The case was really decided on Lord Tenterden's Act, and not on the Statute of Frauds; and the result was that, there being no ratification in writing of the promise made during infancy, the conveyance purporting to be made in pursuance of that promise was voluntary and void under 27 Eliz. against a subsequent purchaser.

Against the authorities which I have been discussing there is the positive decision of Kindersley V.-C. in *Barkworth* v. *Young* (1); also this dictum of Turner L.J. in *Surcome* v. *Pinniger* (2): "But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute."

Moreover, there is the opinion of Lord Cottenham in his judgment in *De Beil* v. *Thomson*, when that case was before him as Lord Chancellor, which judgment is set out in the note to *Hammersley* v. *De Biel*. (3) Lord Cottenham says: "I am aware that in *Randall* v. *Morgan* (4) Sir W. Grant suggests a doubt, whether a written promise after marriage to perform a parol agreement made before could be enforced; but in *Hodgson* v. *Hutchenson* (5), *Taylor* v. *Beech* (6), and *Montacute* v. *Maxwell* (7), it was held that such a subsequent written promise would be binding within the statute."

It does not seem to me that anything which was said by Lord Cottenham in *Lassence* v. *Tierney* (8) as to the grounds of his decision in *Hammersley* v. *De Biel* (3) can get rid of what he said as a dictum in which he deliberately differed from Sir W. Grant's doubt in *Randall* v. *Morgan*. (9) It is to be observed that in the House of Lords counsel abandoned the Statute of Frauds point.

In my judgment the balance of authority, as well as reason, supports the view of Kindersley V.-C. in *Barkworth* v. *Young*. (1)

(1) 4 Drew. 1.
(2) 3 D. M. & G. 575.
(3) 12 Cl. & F. 45.
(4) 12 Ves. 67; 8 R. R. 289.
(5) 5 Vin. Abr. 522, pl. 34.
(6) 1 Ves. Sen. 297.
(7) 1 Eq. C. Ab. 19, pl. 4; Prec. Ch. 526; 1 Str. 236; 1 P. Wms. 618.
(8) 1 Mac. & G. 551, 572.
(9) 12 Ves. 67, 73; 8 R. R. 289.

In my judgment the settlement must in this case prevail against the official receiver, representing the creditors of Dr. Isidore Bourke, first, because, even though the settlement be treated as a voluntary post-nuptial settlement as against the official receiver claiming under the statute of 13 Eliz., yet the circumstances of Dr. Bourke at the date of the settlement, and the source from which the settled property came, and the lapse of time between the settlement and the bankruptcy, all go to negative the inference that the settlement was executed with the intent to defeat or delay creditors; secondly, because, assuming the settlement not to be fraudulent, the recital in the settlement is sufficient evidence against any one claiming through Dr. Bourke of such a parol ante-nuptial agreement as would prevent the post-nuptial settlement from being voluntary. In my opinion, therefore, this appeal must be allowed.

STIRLING L.J. The trustee in bankruptcy raises two objections to the payment of the fund to the trustees of the deed of February 8, 1873: first, that the deed is fraudulent under the statute 13 Eliz. c. 5; and, secondly, that it is voluntary, and that, resting as it does in covenant, it cannot be enforced in equity, and consequently does not bind the property.

These two objections involve different considerations, and must be dealt with separately; but it will be convenient to make some preliminary observations on one point which arises with respect to both, namely, whether the recitals and statements of fact in the deed are admissible as evidence against the trustee in bankruptcy. These recitals and statements are in the nature of admissions made by the bankrupt long prior to the bankruptcy. Admissions of a party to an action, or of one identified in interest with him, are, as against such party, admissible in evidence: see *Spargo* v. *Brown* (1); *Woolway* v. *Rowe*. (2) Now, where the trustee in bankruptcy on behalf of the creditors of the bankrupt claims to treat the deed as void under the statute of Elizabeth, he is asserting a right which the bankrupt could never have set up, and is not identified in interest with the bankrupt; and consequently the recitals and statements

(1) (1829) 9 B. & C. 935. (2) (1834) 1 Ad. & E. 114; 40 R. R. 264.

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in the deed are not admissible against him, though they are admissible against the trustees of the deed, whose interest is the same as that of the bankrupt. On the other hand, when the trustee resists specific performance of the covenants contained in the deed on the ground that it is voluntary, he is setting up a defence which would have been available to the bankrupt himself, and is identified in interest with him; and the recitals and statements in the deed are admissible as against him, though the weight to be attached to them must depend on the circumstances of the case. The distinction just stated is recognised by the Master of the Rolls (Sir Thomas Plumer) in *Battersbee* v. *Farrington* (1), and appears to have been taken by Bramwell B. in *Harris* v. *Rickett.* (2)

As to the circumstances in which the deed was executed, there is little or no evidence other than what appears on the face of the deed itself. It was evidently executed after the marriage; but it purports to have been executed in consideration of marriage and in pursuance of an ante-nuptial agreement. For the reasons just stated, these statements are not admissible in evidence against the trustee in bankruptcy setting up the Statute of Elizabeth. It was expressly decided by Lord Northington in *Spurgeon* v. *Collier* (3), and by Lord Cranworth in *Warden* v. *Jones* (4), that a statement in a deed that it was executed in consideration of marriage was of no avail as against plaintiffs who claimed adversely to the deed; and in the latter case Lord Cranworth said that, notwithstanding the dictum or decision of Lord Thurlow to the contrary in *Dundas* v. *Dutens* (5), his opinion was that the recital made no difference "as against creditors." I think that the weight of authority is in favour of this view, and that for the purpose of the decision of the question whether or not the deed of February 8, 1873, is or is not void against creditors, it must be taken that the deed is not founded on valuable consideration. The deed must, therefore, be treated as a voluntary settlement of the wife's fortune made by the bankrupt soon after marriage. Twenty-five years

(1) 1 Swans. 106; 18 R. R. 32.
(2) (1859) 4 H. & N. 1, 6.
(3) 1 Eden, 55.
(4) 2 De G. & J. 76.
(5) 2 Cox, 235; 1 Ves. Jr. 196; 1 R. R. 112.

elapsed between the execution of the deed and the bankruptcy of the settlor, and there is nothing to suggest that the settlor was indebted at the time he made the settlement, or that any creditors he then had remain unpaid, or that he then had in contemplation any hazardous or speculative transactions. With an exception to be presently mentioned, the deed is such as might in ordinary course be executed by a man of honour, who had, without making any settlement, married a lady of wealth, for the purpose of settling his wife's fortune in such a way as to secure to her, and to his issue by her, such a provision as is in this country commonly made on the occasion of marriage; and, indeed, the trusts are (with the same exception) such as might have been adopted in a settlement by the Court when called on by the wife to enforce her equity to a settlement. The exception referred to is that, under the settlement, a life interest is reserved to the husband on the death of his wife and is made determinable on bankruptcy.

The case does not fall within the line of authorities, such as *Freeman* v. *Pope* (1), which establish that under this statute a voluntary deed may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect. It lies on the trustee in bankruptcy to prove the existence of such intention: *Ex parte Mercer.* (2) The only evidence to that effect is the circumstance that the bankrupt's reversionary life interest is made determinable in the way just mentioned. It may be that such a limitation of the bankrupt's life interest is void as against his trustee: see *Higinbotham* v. *Holme* (3); but does it invalidate the settlement altogether? Apart from authority, I should think not. The only authority relied on is *In re Pearson* (4), a decision of Sir James Bacon, when Chief Judge in Bankruptcy; but with the utmost respect I cannot think that the conclusion of fact (and it is one of fact) at which he arrived was well founded, and certainly I am unable to arrive at a like conclusion in the present case.

I pass on to consider the second objection, that the deed is

(1) L. R. 5 Ch. 538.
(2) 17 Q. B. D. 290.
(3) 19 Ves. 88; 12 R. R. 146.
(4) 3 Ch. D. 807.

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voluntary and cannot be enforced in equity. The answer given to this objection on behalf of the trustees of the deed is, in substance, that the deed, taken as a whole, constitutes a note or memorandum of a parol ante-nuptial contract in consideration of marriage which satisfies the requirements of the Statute of Frauds, and enables the contract to be enforced both against the settlor who signed the deed and against his trustee in bankruptcy, and so binds the property in question. I think that this contention is well founded.

It is laid down by Lord Blackburn in *Maddison* v. *Alderson* (1) that "it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." It is also established, as regards many of the contracts within ss. 4 and 17, that the note or memorandum referred to in these sections need not be contemporaneous with the contract, but is sufficient if it comes into existence before the commencement of the action to enforce the contract: see *Bill* v. *Bament* (2); *Bailey* v. *Sweeting* (3); *Lucas* v. *Dixon.* (4) These decisions are based on the language of the statute. The effect is, as stated by Williams J. in *Bailey* v. *Sweeting* (5), "that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, e.g., unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract." In *Lucas* v. *Dixon* (4) it is pointed out by Fry L.J. that where the plaintiff wishes to avail himself of a memorandum which comes into existence after the commencement of the action, he can only do so by discontinuing the action and commencing another: so that a memorandum coming into existence after the commencement of an action may be available if the plaintiff is in a position to dis-

(1) 8 App. Cas. 467, 488.
(2) (1841) 9 M. & W. 36.
(3) (1861) 9 C. B. (N.S.) 843.
(4) (1889) 22 Q. B. D. 357.
(5) 9 C. B. (N.S.) 859.

continue. The note or memorandum need not be given for valuable consideration nor have any particular form: a letter by the party sought to be charged to a third party—*Bailey* v. *Sweeting* (1); *Gibson* v. *Holland* (2)—an affidavit—*Barkworth* v. *Young* (3)—and even a will—*In re Hoyle* (4)—have each been accepted by the Courts as sufficient. It has, however, been held by Farwell J. that an agreement or memorandum or note of a contract made upon a consideration of marriage must be reduced into writing and signed, not merely before action brought, but before the marriage. The learned judge says that the contract in consideration of marriage differs from other contracts for sale within ss. 4 and 17 of the Statute of Frauds "because the marriage is performed once for all and is irrevocable"; and that "in contracts for sale the consideration continues, for, if the whole purchase-money has not been paid, the balance unpaid remains a consideration at the date of the contract, and, if the whole has been paid, the purchaser can recover it back if the contract is repudiated." I will assume this to be accurate as regards contracts of sale; but there are other contracts within ss. 4 and 17. Take, for example, the case of a guarantee, a promise to answer for the debt of another. The person to whom a verbal guarantee is given may on the faith of it have once and for all irrevocably advanced a sum of money to a pauper from whom he is unable to recover anything back, yet, as is shewn by *In re Hoyle* (4), he can enforce the contract of guarantee if at any time before action brought he is able to obtain a proper note or memorandum in writing signed by the guarantor. It seems to me (speaking with all respect) that the learned judge has overlooked the ground of the decisions that a note or memorandum which comes into existence before action brought is sufficient. As I have said, it is found in the language of the statute, which in s. 4 prohibits the "bringing" of an action "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. If, on the true construction of that section, the commencement of the

(1) 9 C. B. (N.S.) 843.
(2) (1865) L. R. 1 C. P. 1.
(3) 4 Drew. 1.
(4) [1893] 1 Ch. 84.

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action gives the limit within which the note or memorandum on a contract of guarantee may be reduced into writing and signed, I cannot see why another and narrower limit should be imposed by the Courts with reference to contracts in consideration of marriage.

Further, the case of *Barkworth* v. *Young* (1) is an express decision that a contract in consideration of marriage may be enforced against a party who has signed a written memorandum of it after the marriage. There is no decision to the contrary, and there is much authority in the shape of dictum in support of it. In particular I think that, although it may be, as Farwell J. says, that the ultimate decision in *Hammersley* v. *De Biel* (2) turned on part performance by acts other than the mere marriage, nevertheless the judgments of Lord Langdale (3) and Lord Cottenham (4) do shew that those learned judges were of opinion that a verbal ante-nuptial contract in consideration of marriage could be enforced if a proper memorandum in writing was signed after marriage.

The cases relied on to the contrary are *Spurgeon* v. *Collier* (5), *Warden* v. *Jones* (6), and *Trowell* v. *Shenton*. (7) Now, in *Spurgeon* v. *Collier* (5) and *Warden* v. *Jones* (6) the plaintiffs were persons claiming adversely to an instrument which purported to have been executed in consideration of marriage. They were not identified in interest with the party to the action who signed the instrument, but stood in the same position as does the trustee in bankruptcy in the present case when seeking to enforce rights derived under the statute of Elizabeth. These cases appear to me to be consistent with the proposition that an ante-nuptial verbal contract may be enforced against a party to it who has after marriage signed a written memorandum of it, and also against a person identified in interest with him, as I take his trustee in bankruptcy to be when he sets up—as here—the same defence as the bankrupt himself might have set up. They certainly do not

(1) 4 Drew. 1.
(2) 12 Cl. & F. 45.
(3) 3 Beav. 469.
(4) 12 Cl. & F. 61, n.
(5) 1 Eden, 55.
(6) 2 De G. & J. 76.
(7) 8 Ch. D. 318.

establish the contrary proposition, nor, as I think, do the dicta in the judgments cover it. *Trowell* v. *Shenton* (1) was decided with reference to another statute and a different class of cases, but is relied on mainly for the observation of Sir George Jessel M.R. that *Warden* v. *Jones* (2), being subsequent in date to *Barkworth* v. *Young* (3), overrules it; but, as he expressly says, "so far as the two are inconsistent." As I have just said, I think there is no inconsistency between *Barkworth* v. *Young* (3) and *Warden* v. *Jones*. (2)

It was, however, said on behalf of the trustee in bankruptcy that, even if this were so, the deed did not satisfy the requirements of the Statute of Frauds, because it only recites that previously to the marriage the husband agreed to make a settlement, and does not state with whom he agreed. It is, no doubt, necessary that the note or memorandum, to satisfy the statute, should shew who the parties to the agreement are, but they need not be named or specifically described as such; it is sufficient if, by reasonable intendment, it can be inferred from the document who they are: see *Newell* v. *Radford*. (4) For this purpose the whole deed may be looked at. Now, I find the guardians of the wife are named as parties, and the covenants of the husband are entered into with their approbation as such. They are the persons with whom an antenuptial contract would in ordinary course be made. I see no reason why they should have been made parties to the deed except that the contract was made with them, and it is the reasonable intendment that it was actually made with them. I think, therefore, that this objection is not well founded.

In my opinion, therefore, the appeal ought to be allowed.

COZENS-HARDY L.J. stated the facts, and continued:—There is no evidence that at the date of the settlement the husband was in pecuniary difficulties, or was contemplating entering upon speculative transactions. There is, in short, nothing to shew that the settlement was executed with intent to defraud

(1) 8 Ch. D. 318.
(2) 2 De G. & J. 76.
(3) 4 Drew. 1.
(4) (1867) L. R. 3 C. P. 52.

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creditors; but Farwell J., following the decision of Bacon C.J. in *In re Pearson* (1), held that the limitation for the benefit of the settlor was in such a form as rendered the whole settlement fraudulent within the statute of 13 Eliz. It seems to me that, in considering this point, it is not material to decide whether the settlement was voluntary or for value, inasmuch as everybody claiming under the settlement was affected by notice of the provision in the settlement which, and which alone, is said to avoid it in toto. But, for the purpose of this branch of the case, I treat it as a voluntary settlement and disregard the recitals. The decision in *In re Pearson* (1) is not supported by any prior authority, and, so far as I am aware, it has not since been followed. I think it cannot be regarded as good law. It may well be that such a limitation of the settlor's life interest is void as against creditors, but I can see no ground for holding, on the mere construction of the settlement, that such a limitation of the settlor's life interest avoids the settlement in toto.

The next point that arises for consideration is this. As the settlement rests in covenant, the trustees cannot obtain specific performance unless it was for valuable consideration. The statute of Elizabeth not having any application, and there being no ground upon which creditors of the settlor could impeach the deeds, I think it is clear that the official receiver is in no better position than the settlor himself would be, apart from his bankruptcy, or than his executors would be after his death.

It has been argued that the settlement was necessarily voluntary because, under s. 4 of the Statute of Frauds, a mere parol agreement before marriage imposes no obligation upon the settlor; and further, that any note or memorandum is of no validity unless it is signed before the marriage. This argument was adopted by Farwell J. Now, it is well settled that in the case of other contracts within s. 4, such as a contract of guarantee, it is sufficient if the note or memorandum in writing is made after the parol contract and at any time before action brought: *Lucas* v. *Dixon*. (2) It is strange that a different

(1) 3 Ch. D. 807. (2) 22 Q. B. D. 357, 363.

principle should prevail with reference to this one class of contracts made in consideration of marriage.

There are dicta by Lord Hardwicke in *Taylor* v. *Beech* (1), by Lord Langdale in *De Beil* v. *Thomson* (2), and by Turner L.J. in *Surcome* v. *Pinniger* (3), and a decision by Kindersley V.-C. in *Barkworth* v. *Young* (4), to the effect that a signed note or memorandum after marriage of a parol agreement before marriage takes the case out of the Statute of Frauds. In my judgment these dicta and that decision are in accordance with principle, and ought to be followed. If, therefore, there had been a note or memorandum signed by the husband after the marriage and before the settlement, I think an action for specific performance of the agreement could have been maintained against the settlor.

The next question and, to my mind, the most difficult is this, whether it is sufficient that the post-nuptial settlement itself should be, not merely a settlement in fact made in pursuance of an ante-nuptial parol contract, but also a memorandum of the ante-nuptial parol contract. The settlement contains a recital which, though not sufficiently definite and precise to create an estoppel, is, as against the settlor and anybody claiming under him, evidence of a parol agreement, before marriage, between the settlor and his intended wife that such a settlement should be executed as was in fact executed: see *Codrington* v. *Lindsay* (5), per Lord Selborne. There is no evidence to the contrary. The settlement was, ex hypothesi, executed for valuable consideration. Before the Statute of Frauds a settlement made after marriage, in pursuance of a parol contract before marriage, would not have been a voluntary settlement. The Statute of Frauds does not make such a settlement voluntary. It is really only a rule of evidence. It enacts that you cannot prove the parol ante-nuptial contract unless there is a memorandum or note in writing signed by the party to be charged. But such a memorandum or note may be before the deed, or after the deed, or in the deed itself,

(1) 1 Ves. Sen. 297.
(2) 3 Beav. 469.
(3) 3 D. M. & G. 571.
(4) 4 Drew. 1.
(5) L. R. 8 Ch. 588.

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provided only it is before action brought. Sect. 4 of the Statute of Frauds leaves untouched the question whether the contract is or is not in fraud of creditors. It seems to me that a settlement framed as this is may well be a memorandum in writing signed by the settlor sufficient to satisfy the Statute of Frauds. Moreover, as a general rule, evidence may be given to shew that a deed in form voluntary was in truth for valuable consideration: see *Pott* v. *Todhunter* (1); *Gale* v. *Williamson*. (2) The Statute of Frauds excludes such evidence in the case of a post-nuptial settlement, unless there is a signed agreement, or note or memorandum. A settlement in no way referring to the parol contract cannot be a note or memorandum thereof; nor can the marriage be regarded as a part performance sufficient to take the case out of the statute. This, as it seems to me, is all that was decided by Lord Cranworth in *Warden* v. *Jones* (3); and Lord Cranworth's dictum, upon which Farwell J. relies, creates no difficulty when it is remembered that he was dealing with a case in which the plaintiff was asserting that the settlement was "void as against creditors," and was, therefore, in a better position than that of the settlor.

The result is that, in my opinion, there is sufficient and uncontradicted evidence that the settlement was not voluntary. It follows that the trustees of the settlement are entitled to the wife's share, and not the official receiver.

Whether the official receiver is or is not entitled to the husband's life interest under the settlement is a different question, which does not arise upon the present summons. The reversal of Farwell J.'s order will in no way prejudice this.

Solicitors: *Van Sandau & Co.; Tarry, Sherlock & King; H. Clifton Lambert.*

(1) (1845) 2 Coll. 76. (2) (1841) 8 M. & W. 405.
(3) 2 De G. & J. 76, 86.

G. I. F. C.

C. A.
1902
May 28;
June 20.

In re SIDEBOTTOM.
BEELEY *v.* WATERHOUSE.

[1902 S. 843.]

Charity—Mortmain—Real Estate—Devise of Land on Trust for Sale—Bequest of Proceeds to Charity—Extension of Time for Sale—Right of Trustees to retain Land Unsold—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.

A devise of real estate to trustees upon trust to sell the same and hand over the proceeds to a charity is a gift of "personal estate arising from the land" within the exception to s. 3 of the Mortmain and Charitable Uses Act, 1891, and is not affected by ss. 5, 6, and 8 of that Act. The trustees are not obliged to sell the land within a year from the testator's death, but may retain it without obtaining the leave of the Court. They are not, however, at liberty to postpone the sale indefinitely.

APPEAL from a decision of Buckley J.

A. K. Sidebottom, by his will dated May 9, 1898, appointed executors and bequeathed certain legacies, and directed that his executors should have full control and deal with his property as they thought fit, and continued: "My house and property at Whitegates I leave to the Ashton Infirmary for a hospital, everything to be kept just as it is except the silver plate, which I leave to my cousin William Sidebottom. None of the property at Whitegates to be sold, let, or alienated in any way. The two women servants are to have mourning and ten pounds each. The residue of my property is to be sold, and the proceeds handed over to the Ashton Infirmary when my executors so decide."

The testator died on April 3, 1899, leaving a considerable amount of real and leasehold estate besides the property at Whitegates. It was found difficult to sell the land, and an application for an extension of the time for sale beyond the year from the testator's death was made to the Court on the assumption that s. 5 of the Mortmain and Charitable Uses Act, 1891, applied to the devise; and the time was accordingly extended by Stirling J., and subsequently by Buckley J. after an appeal. The case is reported [1901] 2 Ch. 1. By the order

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made by Buckley J., on that occasion (March 27, 1901), he declared that the executors were trustees of the will, and as such the legal estate in the testator's real estate was then vested in them as trustees for sale for the Ashton Infirmary, and ordered that the time for the sale of the land remaining unsold should be extended until March 26, 1902. Other attempts to sell the land had since been made, but in vain. On March 8, 1902, the trustees of the Ashton Infirmary applied by originating summons that it might be declared (inter alia) that the provisions of ss. 5 and 6 of the Act of 1891 did not apply to the gift in the will of the proceeds of sale of real estate to the infirmary. Buckley J., on March 21, 1902, made an order declaring that ss. 5 and 6 did apply to the case, and the order stated that it was made "on the ground that the said orders dated respectively the 26th of March, 1900, and 27th of March, 1901, were based on this view," and he extended the time for a sale for six months with a view to an appeal.

The trustees of the infirmary appealed.

It was stated that the Charity Commissioners disclaimed all interest in the question.

Buckmaster, K.C., and *Martelli*, for the appellants. Under ss. 1 and 10 of the Mortmain and Charitable Uses Act, 1888, no estate or interest in land can be devised to or for the benefit of a charity except upon certain conditions. That includes the proceeds of sale of land directed to be sold. The Act of 1891 alters the definition of land. Sect. 3 is as follows: "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land." A charity can, therefore, now take money arising from or connected with land, such as the proceeds of the sale of land; this case is within the exception contained in s. 3; and it follows that s. 5 of the Act of 1891 does not apply.

[ROMER L.J. The Acts are not confined to assurances by will. If you are right, it will be possible for charities to buy and hold land. If the conveyance is to trustees for sale and to

hold the proceeds for a charity, and then the charity requests the trustees not to sell, that will be good.]

If a charity upsets the terms of a devise and elects to keep the land, it will, no doubt, be within s. 5. In this case the subject-matter of the assurance is not the land, but the money arising from the land.

[ROMER L.J. It is an assurance of land for the benefit of a charity within s. 1, sub-s. 1, of the Act of 1888.]

The gift is precisely within the exception contained in s. 3 of the Act of 1891. There is no assurance of the land to the infirmary. If it is kept as land, the Attorney-General can interfere. The assurance of the land is not for the benefit of anybody.

[ROMER L.J. There is no resulting trust. Somebody must get the benefit, and the beneficial interest is given to the charity.

VAUGHAN WILLIAMS L.J. The exception in s. 3 of the Act of 1891 contemplates a devise of land, for otherwise the question would not arise. Is it intended that the testator must himself sell the land? The mere fact that there is an assurance of land is not enough to bring it within s. 5.

STIRLING L.J. Is not s. 5 intended to prevent election by the charity?]

It has been held that an assurance by will to trustees upon trust to sell and hold the proceeds for a charity is outside s. 5, and that the trustees can retain the land unsold: *In re Wilkinson*. (1) That case has been frequently followed, and many titles have been accepted where no extension of time for sale has been obtained, and the sale has taken place after the expiration of the year: Seton's Judgments and Orders, 6th ed. p. 1336.

O. L. Clare, for the trustees of the will.

Cur. adv. vult.

June 20. The judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.) was read by

ROMER L.J. In this case land was assured by will to

(1) [1902] 1 Ch. 841.

C. A. 1902

SIDEBOTTOM, *In re.* BEELEY *v.* WATERHOUSE.

trustees upon a valid and effective trust for sale, and under the will the charity took no interest except in the proceeds of sale. It is not a case where, according to the true construction of the will, land or any "tenements and hereditaments, corporeal or incorporeal, of any tenure" was given directly to the charity, or to trustees upon trust for the charity. And so far as concerns any rents or profits derived from the land before sale, they would only pass by implication to the charity as mixed with, and so as to be inseparable from, the proceeds of sale when the land was in fact sold. Under these circumstances, having regard to s. 3 of the Act of 1891, and to the object and intention of the Legislature as gathered from that Act as a whole, we have come to the conclusion that this is not a case where land has been "assured by will to or for the benefit of any charitable use" within the meaning of those words as used in s. 5 of the Act, and accordingly that ss. 5 and 6 of the Act have no application. No doubt by this will "land" was "assured," and under the will the charity derived a "benefit." But by this will the charity obtained no benefit, except a benefit in the "personal estate arising from the land" after the testator had affected the land with an effective trust for sale. This being so, in our opinion (as already stated), land, within the definition of s. 3 of the Act, was not as land assured by will to or for the benefit of any charitable use.

At the same time we desire to make it clear that this decision does not make it easy or possible for a charity to escape from the object of the Mortmain and Charitable Uses Act, 1888, as altered by the Act of 1891, so far as that object was directed to prevent charities holding land. In the present case, for example, in the events which have happened, the charity is alone interested in the proceeds of sale when the land is sold. But that fact will not justify the trustees, even by the direction or with the consent of the charity, in indefinitely postponing the sale, and holding the land simply for the benefit of the charity. The trustees are still bound to carry out the trust for sale within a reasonable time from the death of the testator. The charity would have no right to revoke the trust for sale, or to authorize the trustees not to carry that trust out duly and

properly. And we think that, in any case where it was made clear that by express or tacit arrangement between trustees for sale and a charity land was in fact being held unsold for an unreasonable time, it would be open to the Attorney-General to take action. It may be pointed out that the accounts rendered by the trustees of a charity to the Charity Commissioners, pursuant to s. 44 of the Charitable Trusts Amendment Act, 1855, ought to afford the means of ascertaining whether land is being so dealt with.

In the present case we have not to consider for how long it will be reasonable for the trustees not to sell the land. That question is not before us. But it may well be that, after the expiration of the time already allowed by the Court for the postponement of the sale, the trustees will run considerable risk by postponing the sale, unless they obtain the direction and authority of the Court, not, indeed, under the provisions of s. 5 of the Act of 1891, which have no application to the case, but under the general jurisdiction of the Court as to trusts. We may add that the effect of our decision would seem to be that, in a case like the present, the provisions of s. 8 of the Act of 1891 have no application to the land devised by the will unless the charity has money available to purchase land under the provisions of some other will.

In the result we discharge the order appealed from, and declare that the provisions of ss. 5 and 6 of the Act of 1891 do not apply to the land devised by the will.

Solicitors: *Woodcock Ryland & Parker, for Leonard Bottomley, Ashton-under-Lyne.*

H. C. R.

KEKEWICH J.

1902

June 5.

In re ANDREWS. ANDREWS *v.* ANDREWS.

[1902 A. 257.]

Donatio Mortis Causâ—Subject-matter—Post Office Savings Bank—Deposit-book—Government Stock Investment Certificate.

The delivery of a Post Office Savings Bank deposit-book may constitute a good donatio mortis causâ of the balance standing to the credit of the depositor; but where a deposit is invested by the Post Office Savings Bank for the depositor in Government stock under the regulations contained in the deposit-book by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit-book cannot constitute a good donatio mortis causâ of the Government stock.

THIS was a summons taken out by one of the executors of the will of Miss A. Caroline Andrews to determine the validity of certain donationes mortis causâ made by the testatrix to her sister, Miss Anna Catharina Andrews.

On August 31, 1901, the testatrix, being then in expectation of death, expressed a desire that in the event of her death her sister should have all her money in the Post Office Savings Bank, including a sum which the bank had invested in Government stock for her, and the testatrix delivered to her sister a desk containing her Post Office Savings Bank book and an investment certificate issued to the testatrix by the Post Office Savings Bank for 50*l.* 10*s.* Local Loans 3 per cent. Stock, and she gave her the key of the desk. The testatrix died on September 2, 1901.

It was not seriously disputed, having regard to the recent decision of Byrne J. in *In re Weston* (1), that there was a good donatio mortis causâ of the balance (130*l.* 6*s.* 1*d.*) standing to the credit of the testatrix at the Post Office Savings Bank at the date of her death. The only substantial question was whether the delivery of the bank-book and the investment certificate constituted a good donatio mortis causâ of the Local Loans 3 per cent. Stock.

(1) [1902] 1 Ch. 680.

The rules contained in the savings bank book provided for the receipt of deposits for investment upon certain conditions, and rule 16 enabled depositors to invest their deposits in certain descriptions of Government stock, including Local Loans 3 per cent. Stock. The rule then continued as follows: "Dividends upon such stock standing in a depositor's name will be credited to his deposit account as they become due, and will be entered in his deposit-book when it is received for the annual examination. They will when credited carry interest like cash deposits. Any depositor who may desire to invest in Government stock must forward to the Controller of the Savings Bank Department an application on a printed form to be obtained at any Post Office Savings Bank, and the deposit-book will also be required in that department, but where a deposit is made for the purpose of immediate investment, the book need not be sent with the application to invest, but can be held over until the acknowledgment of the deposit is received. The investment will be at the current price of the day on which it is made, and a certificate thereof will be sent to the depositor by post. Sales of stock will be effected at the request of the depositor, made in like manner, the application being accompanied by the deposit-book and investment certificate, and in such case the value of the stock at the current price of the day of sale, less the commission, will be forthwith paid by warrant to the depositor at the Post Office Savings Bank most convenient to him. A depositor may transfer stock standing to the credit of his account with the Post Office Savings Bank into his own name at the Bank of England upon making application to the Savings Bank Department on a form which can be obtained at any Post Office Savings Bank, and sending it with his deposit-book and investment certificate." The rule also enabled a depositor having sufficient stock standing to his credit in the Government Stock Register of the Post Office Savings Bank to obtain a stock certificate in the manner therein prescribed, and provided that in that case the stock would be written off the depositor's account in the books of the savings bank, and that all further dividends would be payable at the Bank of England or its country branches. The bank-book also contained an entry of the sum of stock invested for the depositor.

KEKEWICH J. 1902 ANDREWS, *In re.* ANDREWS *v.* ANDREWS.

The investment certificate certified that 50*l.* 10*s.* Local Loans 3 per cent. Stock had been placed on the Savings Bank Investment Account of the National Debt Commissioners, that the same had been credited in the Government Stock Register of the Post Office Savings Bank to Amy Caroline Andrews, and that the deposit account had been charged with the sum of 51*l.* 1*s.* 4*d.*, being the price of the stock at the date of investment and commission. It also contained a note that in the event of the depositor desiring to sell the stock, or to obtain a stock certificate under the National Debt Act, 1870, or to transfer it into his own name in the books of the Bank of England, he must forward the certificate and his deposit-book, with his application, to the Controller of the Post Office Savings Bank.

H. E. Wright, for the summons.

Lyttelton Chubb, for Miss Anna Catharina Andrews. Where money is deposited in the Post Office Savings Bank, and is invested by the bank in Government stock for the depositor, for the purposes of a donatio mortis causâ it stands in precisely the same position as any other money deposited in the savings bank. The bank-book and the investment certificate form evidence of the indebtedness of the bank and of the circumstances of that indebtedness. The stock is not put into the depositor's name, but remains in the name of the National Debt Commissioners. The postmaster receives the dividends, and he carries them to the credit of the depositor's account. If the depositor had transferred the stock into his own name, then, no doubt, the stock could not have been the subject of a donatio mortis causâ; but here no transfer of the stock by the depositor is required, and a good title can be made by presenting the investment certificate and the deposit-book to the Post Office Savings Bank.

George Cave, for the other executor, who was also beneficially entitled under the will, was not heard upon this point.

KEKEWICH J. It seems to me that as regards the savings bank deposit the law must be taken to be settled. The very question came before Byrne J., and his view was that apart from authority it was impossible to distinguish on principle the

case of an ordinary receipt given by bankers from a deposit-note given by the Post Office Savings Bank in the ordinary form. He says (1): "Apart from authority pointing the other way, I should have considered it impossible, after comparing the terms of the deposit receipts in the cases of *In re Dillon* (2) and *Moore* v. *Darton* (3) with the savings bank book, to hold that the latter is not a good subject for donatio mortis causâ." I express my entire concurrence with the learned judge. In my opinion, the case of *In re Dillon* (2) governed the case before him and governs the case before me, so far as it is not covered by Byrne J.'s decision. The other point is new—that is to say, the particular facts are new. The Post Office gives facilities to depositors to invest in Government stock. They may invest through the Post Office Savings Bank in their own names, and in that case it becomes stock invested in the depositor's name in the ordinary way, and can only be realized in the ordinary way. It cannot be contended that that could be good subject-matter for a donatio mortis causâ. Both principle and authority are against it. But in order to assist depositors the Post Office does something else. Instead of purchasing so much stock in the names of the depositors, it itself invests the money for them—that is to say, the Post Office Savings Bank acts as trustee for the depositor, and then the depositor has a certificate called an investment certificate. [His Lordship referred to the certificate issued to the testatrix, and continued:—]

There is a large sum of Local Loan Stock standing in the name of the National Debt Commissioners. They can only transfer that in the ordinary way at the Bank of England; but they have a Post Office Savings Bank account in their books, and in that account they credit the Post Office Savings Bank with this sum of 50*l.* 10*s.* on behalf of Amy Caroline Andrews. There is no transfer of stock: it is a mere credit in the books. If the depositor desires to realize there must be, to keep things straight, a debit of so much as is to be transferred to her. There is no transfer; but the 50*l.* 10*s.* is credited to her at the current price of the day less commission, and the result is that

(1) [1902] 1 Ch. 686. (2) (1890) 44 Ch. D. 76.
(3) (1851) 4 De G. & Sm. 517.

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she is entitled to receive that amount in cash, and if she so requests it will be paid to her by warrant at the Post Office Savings Bank most convenient to her. If she exercises the privilege of changing her mind and prefers the money to go to her account at the savings bank, she has to make a redeposit, or, strictly speaking, a fresh deposit, notwithstanding that she never touches the money. The depositor cannot get this money simply by asking that it shall be paid to her; but these forms have to be gone through, and in fact it is a sale of the stock standing in her name, though as a matter of fact there is no sale at the Bank of England. Now, the principle of the case of *In re Dillon* (1) as stated by Byrne J. is this (2): "The test appears to be whether or not the document, besides acknowledging the receipt of the money, expresses the terms on which it is held, and shews what the contract between the parties is." So far we have a book in which the sum of 50*l.* 10*s.* Local Loans Stock is mentioned. That shews that the Post Office Savings Bank has invested the money, and the rules which are printed in the book no doubt shew the terms on which it is held. But it was not intended by the learned judge that that should be necessarily exhaustive. One must go a step further, and Byrne J.'s decision does not assist me to say that this must be a proper donatio mortis causâ of the Local Loans Stock so invested. To hold that would be pushing the doctrine beyond *In re Dillon* (1) and beyond Byrne J.'s decision. Notwithstanding that there have been some cases of late years in which the doctrine has been extended, I do not think that this extension ought to be allowed. I agree it is only going a little further; but it is a substantial step, and I do not think it is a step which ought to be taken. If there is any further discussion of the case and the Court of Appeal thinks that it ought to be taken, well and good; but I do not think that a judge of first instance ought to go beyond what has been previously decided on these lines.

Solicitors: *Radford & Frankland; William D. Mercer; Pritchard & Sons.*

(1) 44 Ch. D. 76.

(2) [1902] 1 Ch. 685.

H. B. H.

JARED *v.* CLEMENTS.

BYRNE J.

1902

May 27, 31.

[1901 J. 1377.]

Vendor and Purchaser — Equitable Mortgage — Notice — Fraud of Vendor's Solicitor — Legal Estate — Possession of Title-deeds — Forged Receipt — Priority.

Prior to the completion of a purchase in August, 1899, the purchaser's solicitors discovered the existence of an equitable mortgage of January, 1897, not disclosed by the abstract, and required it to be discharged; on completion of the purchase, the vendor's solicitor, who was also the solicitor of the equitable mortgagee, produced the deed creating the equitable mortgage with what purported to be a receipt, signed by the mortgagee, for all moneys due on the security; an assignment of the property by the vendor to the purchaser, passing the legal estate, was executed, and the equitable mortgage with the receipt and all the other title-deeds were handed to the purchaser. The receipt on the equitable mortgage was a forgery, and on an action being brought by the equitable mortgagee against the purchaser to establish the priority of his charge:—

Held, that as the defendant had purchased with notice of an incumbrance which, as a fact, was still subsisting, the legal estate and possession of the title-deeds afforded no protection, and that the plaintiff's equitable mortgage therefore had priority, and could still be enforced against the defendant.

TRIAL OF ACTION.

The question for decision in this action was whether, as between two innocent parties, a purchaser and an equitable mortgagee, who had both been defrauded by one Charles Parr, a solicitor, the legal estate and possession of the title-deeds by the purchaser gave him priority over the equitable mortgagee, and so enabled the purchaser to hold the property free from the mortgage. The facts, so far as material, were as follows:—

In January, 1897, one Joseph Taylor purchased two leasehold houses, and applied to his solicitor, Charles Parr, to find him 450*l.* to complete his purchase. The plaintiff, another client of the said Charles Parr, at Parr's request found the money, and the purchase was completed and the houses were duly assigned to Taylor. On January 15, 1897, Taylor signed a memorandum of deposit in favour of the plaintiff for the 450*l.* so advanced, and charged the houses comprised in the title-

BYRNE J. 1902 JARED v. CLEMENTS.

deeds deposited by way of equitable mortgage, by way of security to the plaintiff, with the repayment of the sum of 450*l.* with interest thereon at 5*l.* per cent. The title-deeds so deposited remained with Charles Parr as the plaintiff's solicitor.

In September, 1898, a receiving order in bankruptcy was made against Taylor, which was rescinded in January, 1899. In July, 1899, Taylor contracted to sell these two houses to the defendant for 630*l.*, Parr acting as his solicitor in the matter of this sale. The abstract of title as delivered to the defendant did not disclose the equitable mortgage of January, 1897, but, on searching the file in bankruptcy to satisfy themselves that the receiving order had been discharged, the purchaser's solicitors discovered the existence of the equitable mortgage in favour of the plaintiff, and they thereupon wrote requiring it to be discharged; to this Parr replied that he should be prepared to hand over the memorandum of deposit, with a receipt indorsed, on completion. This was considered satisfactory, and on August 10, 1899, the purchase was completed, and an assignment of the property by the vendor to the defendant passing the legal estate was executed, and at the same time the memorandum of deposit, with what purported to be a receipt, signed by the plaintiff, for all moneys due on the security, was handed over to the defendant's solicitor, together with all the title-deeds relating to the property: this receipt was dated August 10, 1899. As a fact, the signature on this receipt was not that of the plaintiff, who knew nothing at all about the transaction, but was a forgery committed by Charles Parr. No portion of the 450*l.* had been paid to the plaintiff. Interest on this equitable mortgage was regularly paid to the plaintiff by Parr, in the first instance as Taylor's solicitor, and afterwards mainly out of his own pocket, from January, 1897, till the year 1901, when Parr absconded, and this and other frauds were discovered. The plaintiff commenced this action to establish the priority of his charge against the defendant. The action was tried with witnesses, and the plaintiff was examined and cross-examined as to his mode of dealing with his solicitor, Charles Parr, with the result that the Court found

that he had been guilty of no negligence or misconduct in allowing the title-deeds to remain with his solicitor.

Norton, K.C., and *Method*, for the plaintiff. The title-deeds were properly left by the plaintiff in the custody of his solicitor; after the equitable mortgage they were held by Parr as agent for the plaintiff, and the plaintiff was guilty of no negligence in leaving these deeds with his solicitor. The defendant had express notice of this equitable mortgage before the completion of the purchase, and, owing to the forged receipt, this mortgage as a fact was not discharged; the mortgagee, therefore, has priority over the purchaser.

[They also referred to Fisher on Mortgages, 5th ed. p. 19, paragraph 36.]

Rowden, K.C., and *W. H. Cozens-Hardy*, for the defendant. There was no negligence on the part of the purchaser: no precautions were omitted; and it was believed that this mortgage had been discharged; the purchaser was deceived by a forged receipt; still, as the defendant obtained the legal estate and has possession of all the title-deeds, the protection always afforded by the legal estate, as between two innocent parties, ought to be sufficient to turn the scale in favour of the purchaser: *Ratcliffe* v. *Barnard* (1); *Bailey* v. *Barnes* (2); *Hewitt* v. *Loosemore*. (3) It takes a great deal to deprive a purchaser of the benefit of the legal estate. The answer made to the inquiry about this equitable mortgage by Parr was a reasonable one; we were not bound to make further inquiries when the memorandum with the receipt indorsed was produced: *Jones* v. *Williams*. (4) We were not bound to go behind the actual documents produced, there being nothing to cause any suspicion: *Earl of Gainsborough* v. *Watcombe Terra Cotta Clay Co.* (5) The defendant in this case obtained the legal estate immediately on the completion of the purchase; it was not like the case of acquiring a legal estate to cure a defective title; this makes a difference: *Pilcher* v. *Rawlins*. (6) As between two

(1) (1871) L. R. 6 Ch. 652.
(2) [1894] 1 Ch. 25.
(3) (1851) 9 Hare, 449.
(4) (1857) 24 Beav. 47.
(5) (1885) 54 L. J. (Ch.) 991.
(6) (1872) L. R. 7 Ch. 259, 268.

BYRNE J. 1902 JARED v. CLEMENTS.

equally innocent parties with equal equities who have both been defrauded, the legal estate and possession of the deeds is a sufficient protection against the plaintiff's claim.

[An objection was also taken to the form of the memorandum of deposit, but, having regard to the evidence, this portion of the argument is not material.]

Norton, K.C., in reply. The defendant purchased with notice of an incumbrance which, as a fact, is still subsisting, and consequently the legal estate does not protect him: the cases dealing with the protection afforded by the legal estate do not apply to a case like the present. There appears to be no reported case directly in point.

Cur. adv. vult.

May 31. BYRNE J., after shortly stating the facts relating to the purchase by the defendant from Taylor, continued:— The memorandum of deposit and title-deeds were in the hands of Charles Parr, the solicitor, having been left with him for safe custody by the plaintiff; but I cannot find that he had any authority, either express or implied, to deal in any way with these documents.

No reasonable precaution was neglected by the purchaser; nor was the plaintiff, the mortgagee, guilty of any negligence or misconduct.

Under these circumstances the question arises whether the defendant, having the legal estate and possession of the title-deeds, is entitled to hold the property free from the mortgage, or whether the plaintiff, as equitable mortgagee, can uphold his security.

I think that the contention of the plaintiff must prevail. There was a subsisting charge in his favour, of which the defendant had notice prior to the payment of the purchase-money. Having this notice, it was for the defendant, or his solicitors on his behalf, to be satisfied that the incumbrance was discharged before parting with the money. The defendant's solicitors were satisfied with what appeared to be, but was not in fact, sufficient evidence, and I am unable to say that the fraud practised upon them by the vendor's solicitor enabled the

defendant to stand in the same position as if he had never had notice of the charge.

If the arrangement had been that the equitable mortgagee should join in the assignment to the defendant, and he had not joined, but some person had fraudulently personated him and forged his name at the completion, the point would have appeared, I think, clear; the principle seems to me the same.

The case is a hard one upon the defendant, and not the less so because, if less diligence had been shewn by the gentleman who actually made the search in bankruptcy, the mortgage would probably never have been disclosed, and the purchaser could then have claimed to be a purchaser for value without notice; but, on the other hand, a decision against the plaintiff would have been equally hard upon him, as he would have been deprived of his security, without any default on his part, by the fraud for which I feel bound to hold the defendant must suffer instead.

A point was taken, that the memorandum of deposit did not operate as a charge because the property included in it was not described; but inasmuch as the mortgagor and mortgagee, as well as the purchaser, all knew and acted upon the footing that the property intended to be dealt with by the memorandum was, as in fact it was, that to which the deposited deeds related, and as the deposit alone would have created an effectual charge, I do not think that this objection is well founded or can affect the result.

Solicitors: *Watson Dyer & Rydon; Shepheards & Walters.*

W. C. D.

FARWELL J.

1902

June 10, 11, 18.

BRITISH HOMES ASSURANCE CORPORATION, LIMITED *v.* PATERSON.

[1901 B. 2019.]

Partnership—Liability for Fraud of Co-partner—Contract with Individual before Partnership—Novation—Election to abide by Contract with Individual—Solicitors.

Where A. has a contract with B., and B. takes C. into partnership and gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business.

The plaintiffs appointed B. their solicitor, and instructed him to act for them in a mortgage transaction. While the business was pending, B. took the defendant into partnership, and gave the plaintiffs notice in writing. The plaintiffs paid no attention to the notice, continued to correspond with B. in his own name, and finally sent him the money to advance on the mortgage by cheque made payable to his order, and accepted his receipt in his own name. B. paid the money into his own account and misappropriated it:—

Held, that the plaintiffs had elected to continue to employ B. alone, and the defendant was not liable for B.'s fraud.

THE plaintiffs were a limited company, whose chief business was to advance money on the security of house property to the holders of certain house property certificates. The company were in the habit of appointing local solicitors to act for them in respect of all mortgages within a certain district. In May, 1899, they appointed Frederick Atkinson, a solicitor who carried on business at Hastings and Bexhill under the name of Atkinson & Atkinson, their local solicitor for the district of Hastings. The plaintiffs knew that Atkinson had no partner. In September, 1900, the plaintiffs wrote to Atkinson under his firm name, instructing him to act for them in the matter of a mortgage for 360*l.* to be advanced to a Mr. Coleman. There was some delay in the matter, and it was not completed until after June 1, 1901.

By a deed dated December 31, 1900, the defendant Paterson

entered into partnership with Atkinson as from December 1, 1900. The deed recited that it had been agreed that the defendant should purchase a third share of Atkinson's business, including profits of offices and appointments, for 1500*l.*, which was paid down on the execution of the deed. It then provided that Atkinson and Paterson should become and be partners in the profession of solicitors and conveyancers, in continuation of the business carried on for many years by Atkinson, for their joint lives under the style or firm of Atkinson & Paterson, and that neither partner should enter into any engagement on behalf of the firm except in its name; and that all moneys received on account of the partnership should be paid to the bankers of the partnership in the same cheques, &c., in which they were received. The defendant had not himself seen the books of F. Atkinson's business, but had received a favourable report from accountants who had examined them.

On February 5, 1901, Atkinson gave notice in writing to the plaintiffs that he had taken the defendant into partnership, and that the business would in future be carried on under the name of Atkinson & Paterson. This notice was received by the plaintiffs, but they took no notice of it, and their house property manager, who conducted all the correspondence with Atkinson, continued to correspond with him under the name of Atkinson & Atkinson, because, as he stated in evidence, he had no instructions to the contrary.

On February 28, 1901, the plaintiffs sent the money for completion of Coleman's mortgage by a cheque dated February 23, drawn to Messrs. Atkinson & Atkinson or order, in a letter addressed to Messrs. Atkinson & Atkinson. F. Atkinson indorsed the cheque "Atkinson & Atkinson," and signed a receipt in that name, which was sent to, and accepted by, the plaintiffs. The money was paid by F. Atkinson into his private account. The account was then overdrawn by 330*l.*; the balance of 30*l.*, by which the account was put in credit, was drawn out by Atkinson within a few days and applied to his own use. F. Atkinson had never kept any banking account in the name of Atkinson & Atkinson; the account in his own name was used as his business as well as his private account.

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The defendant began to attend regularly at the Hastings office on or about February 5, 1901. The name-plate on the door of the Hastings office was changed to Atkinson & Paterson, but that at the Bexhill office was not altered. No books of the new firm were in fact kept, and no banking account was opened in its name. No moneys were paid out of F. Atkinson's account to or for the benefit of the partnership. Paterson had no power to draw upon F. Atkinson's account.

On March 15 the defendant first heard of the Coleman transaction, and he then discovered that F. Atkinson had misappropriated the 360*l.* and other moneys, and that the business was hopelessly insolvent. Shortly afterwards F. Atkinson absconded.

The partnership was dissolved on March 23, 1901; and on May 14, 1901, the plaintiffs brought this action to recover the 360*l.* from the defendant as money received by the partnership.

Jenkins, *K.C.*, and *A. P. Poley*, for the plaintiffs. The case is plainly within ss. 10 and 11 of the Partnership Act, 1890. (1) The money was received by the firm within s. 11 (*b*). If not, it was clearly received by Atkinson, acting in the ordinary course of the business of the firm within s. 10, or within the scope of his apparent authority within s. 11 (*b*), and the defendant is severally liable under s. 12. Appointments are specially

(1) 53 & 54 Vict. c. 39, s. 10: "Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

Sect. 11: "In the following cases; namely:—

"(*a*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

"(*b*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss."

Sect. 12: "Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."

referred to in the partnership deed, and this money was received by Atkinson either under his appointment or within the general scope of the partnership business. The receipt of money for a particular investment is within the scope of a solicitor's business, though its receipt for general investment is not: *Harman* v. *Johnson* (1); *Bourdillon* v. *Roche*. (2) It makes no difference that the person who entrusts the money to the partner thought he was dealing with one person carrying on business under a firm name. Nor does it matter what became of the money. When it is once traced to the hands of a partner, the burden is on the firm to discharge itself.

F. Thompson (*Upjohn, K.C.*, with him), for the defendant. The plaintiffs originally employed Atkinson alone as their solicitor; they had notice that he had taken the defendant into partnership, but they never adopted the firm as their solicitors, but elected—as they had a right to do—to continue to employ Atkinson alone. A point was made of the recital in the partnership deed, but that merely shews a contract between Atkinson and the defendant to share the profits. The plaintiffs were not bound. A solicitor cannot make his partner a client's solicitor without the client's consent. The plaintiffs must prove novation. They ask the Court to assume it; but all the evidence is in favour of an election not to adopt the new firm as their solicitors. They entrusted the money to Atkinson to pay Coleman, not to use on behalf of the partnership. It would have been a breach of trust on his part to pay it into the firm's account; and in fact it never came into that account, and the firm got no power over or benefit from the money. The case is within the principle of *Jacobs* v. *Morris*. (3)

Jenkins, K.C., in reply. There is no question of novation. If this was partnership business, then Atkinson was the agent of the firm. The only way to disprove agency is to shew that this was not partnership business, or that the plaintiffs are in some way estopped from saying that it was. There is nothing in the plaintiffs' conduct to cause such an estoppel. There was no negligence in drawing the cheque to one partner only; the

(1) (1853) 2 E. & B. 61. (2) (1858) 27 L. J. (Ch.) 681.
(3) [1902] 1 Ch. 816.

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partnership is liable though only one partner is employed: *Blair* v. *Bromley* (1); *St. Aubyn* v. *Smart*. (2) If Atkinson had been the agent of an undisclosed principal, nothing that the plaintiffs have done would prevent their suing the principal: *Curtis* v. *Williamson*. (3)

Cur. adv. vult.

June 18. FARWELL J. This is one of those unfortunate cases in which the Court has to determine which of two innocent parties must suffer for the defalcations of a rogue. [His Lordship stated the facts of the case as above, and continued:—]

In these circumstances the plaintiffs allege that the defendant is liable as a partner, and rely on ss. 10 and 11 of the Partnership Act. [His Lordship here read these sections, and continued:—] Now the liability of partners which is declared by these sections is merely a branch of the law of principal and agent. "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership" (s. 5), and all the partners are liable because the individual partner has acted or contracted as agent for them as either disclosed or undisclosed principals; if disclosed, because the act or contract is avowedly with them or on their behalf; if undisclosed, because the law gives the other contracting party the option of proceeding against the undisclosed principal when discovered. But where A., knowing B. and C. to be partners, refuses to contract with them jointly and insists on contracting with B. alone, he cannot afterwards treat B. as liable. "Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. 'Quod semel placuit in electionibus amplius displicere non potest.'" (4) The several liability of B. is a totally distinct thing from the joint liability of B. and C. A. had his option which he would accept, and he elected to accept B.'s several liability. The same principles apply to a

(1) (1847) 2 Ph. 354.
(2) (1867) L. R. 5 Eq. 183.
(3) (1874) L. R. 10 Q. B. 57.
(4) Per Lord Blackburn, *Scarf* v. *Jardine*, (1882) 7 App. Cas. 360, quoting Co. Litt. 146 a.

contract made between A. and B. where B. subsequently takes C. into partnership and gives A. notice thereof. The question then becomes one of novation. Has the original contract been discharged by the acceptance of the new liability? I take the law as stated in Lindley on Partnership, 6th ed. p. 246: "In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the agreement, or should, at all events, shew by some act of his own that he accedes to the substitution. If A., being indebted to B., transfers his liability to C., and B. does not assent to the transfer, his rights are wholly unaffected: he will neither acquire any right against C. nor lose his former right against A. As regards B. the agreement between A. and C. is res inter alios acta, and it does not in any way benefit or prejudice him. But if B. assents to the arrangement come to between A. and C., and adopts C. as his debtor instead of A., then A.'s liability to B. is at an end, and B. must look for payment to C. and to him alone." A. is of course not bound to accept the liability of B. and C. in discharge of that of B., and if he gave express notice that he refused to do so he would have finally elected to abide by the original agreement; but "he is not bound to elect at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons." (1) The questions that I have to decide are—(1.) Did the plaintiffs before action elect either to abide by their original contract or to adopt the new firm as their solicitors in Coleman's matter in lieu of Atkinson, and (2.) if not, can they so elect by the writ or now at the bar? In my opinion, the plaintiffs prior to the writ elected to stand by their original contract. They knew of the change in the firm; they did not merely continue to address their letters to Atkinson & Atkinson, but they actually sent the money to Atkinson & Atkinson, by cheque payable to Atkinson & Atkinson, and accepted a receipt from Atkinson & Atkinson. Indeed, it was hardly contended by the plaintiffs that they had elected to novate before action, but it was urged that it was still open

(1) *Scarf* v. *Jardine*, 7 App. Cas. 360.

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to them to elect, and that the issue of the writ was an election to adopt the new firm as their solicitors. In my opinion this is not so, but the payment of the whole money to Atkinson operated as an election to abide by the original contract, and being once made could not afterwards be retracted.

But even if this were not so, they could not, in my opinion, now elect to make the defendant liable. The principle applicable is the same as that which is applied by the Courts in the case of an undisclosed principal. It is true that the party who contracted with the agent can sue the principal when discovered, but this is subject to the qualification that nothing has occurred in the meantime to make it unjust. "If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent." (1) It would, in my opinion, be manifestly unjust to allow the plaintiffs to deal with Atkinson alone so long as any payment was to be made by them, and to allow them to elect to deal with Atkinson & Paterson, when the liability for the sum so paid to Atkinson alone came in question.

The plaintiffs relied on the sections of the Partnership Act to which I have referred, but that Act is declaratory only. It states the law as it affects partners in relation to third persons under ordinary conditions and in the absence of special circumstances. It in no wise affects the acts or defaults of third persons contracting with the partners or any individual member of the firm. It is said that the case of the defendant falls within the exact terms of ss. 10 and 11 (*a*), inasmuch as Atkinson was "acting in the ordinary course of the business of the firm" (s. 10), and "acting within the scope of his apparent authority" (s. 11 (*a*)); but even if this were so, the plaintiffs' contention would involve the introduction of some such words as these: "Notwithstanding that the person complaining has declined to contract with or recognise the

(1) Per Bayley J. in *Thomson* v. *Davenport*, (1829) 9 B. & C. 88; 32 R. R. 578.

partner as partner." But the words of the Act do not refer to the rights and liabilities of the partners inter se in the abstract, but only in relation to contracts made with or acts done to the detriment of third persons, and those third persons must be persons who are dealing with the partner as such, or who are in a position to elect to deal with the partner as such, or to treat his wrongful act as the act of a partner. In my opinion, the defendant does not come within the words of the Act, because I do not think that it is open to a third person to assert that the individual with whom he has intentionally contracted as an individual on his several contract, or with whom he has elected to continue a contract as with an individual, was acting in the ordinary course of the business of the firm, or was acting within the scope of his apparent authority. He knew that he was not acting, or appearing to act, for the firm at all, and he preferred to have it so. Further, in my opinion, s. 11 (*b*) has no application, because in the circumstances I think it impossible to hold that the firm of Atkinson & Paterson did, in fact, receive money or property of the plaintiffs. The cheque was, as I have said, drawn payable to Atkinson & Atkinson, was intentionally sent in a letter addressed to Atkinson & Atkinson, and was paid into the account of Atkinson alone, and was received and dealt with by Atkinson alone. The plaintiffs' action fails and must be dismissed, with costs.

Solicitors: *E. C. Rawlings & Butt; Field, Roscoe & Co.*

J. R. B.

BUCKLEY J.

1902

May 28; *June* 3.

In re NATIONAL BANK OF WALES.

Costs — Taxation — Drawing Bills of Costs — Company — Winding-up — Companies Winding-up Rules, April, 1892, *r.* 17.

The costs of drawing bills of costs are allowed where there is litigation, or where there is a quasi-litigation (e.g., an application for payment out of a fund or to determine the construction of a will), but are never allowed where the order is to tax a bill already delivered, or the order is one as between the solicitor and his own client for delivery of a bill and its taxation.

The rule is applicable in the case of the costs of a liquidator in a voluntary winding-up.

THE National Bank of Wales, Limited, sold to the Metropolitan Bank of England and Wales certain assets, including claims which the former company had against third parties. By the agreement for sale the Metropolitan Bank was to pay all the charges, costs, disbursements, and expenses of the National Bank and its liquidators of and incidental to its winding-up and dissolution and the sale. To recover the amount of these claims the liquidator of the National Bank took proceedings, and in so doing he incurred costs to the extent of 3754*l.* He claimed from the Metropolitan Bank payment of this 3754*l.*, upon the footing that the Metropolitan Bank were bound to indemnify him against the costs incurred in getting in claims which he had got in for the benefit of the Metropolitan Bank as purchasers.

The Metropolitan Bank required particulars of these costs, to shew how the 3754*l.* was arrived at. The liquidator accordingly procured the bills of costs from his solicitor. The costs of drawing the bills amounted to 301*l.* The Metropolitan Bank upon production of these bills of costs were satisfied, and paid their amount, namely, 3754*l.*, but did not pay, and so far as appeared were not asked to pay, the 301*l.*

The liquidator on February 21, 1901, obtained an order in the winding-up for the taxation of the several bills of his solicitor as between solicitor and client. The costs charged for drawing these bills amounted to 73*l.*

The taxing master disallowed both the 301*l.* and the 73*l.*

The liquidator, on a summons to review the taxation, contended that under the order of February 21, 1901, the taxing master ought to have allowed the 301*l.*, upon the footing that the amount was incurred in the winding-up for the purpose of obtaining payment from the Metropolitan Bank of the 3754*l.* He also contended that the taxing master was wrong in disallowing the 73*l.*

Christopher James, for the liquidator. By rule 70 of the General Order of November, 1862, which was framed to regulate the mode of proceeding under the Companies Act, 1862, "Solicitors shall be entitled to charge and be allowed the fees set forth and referred to in the first schedule hereto, unless the Court or judge shall otherwise specially direct." The schedule, after stating the charges for certain matters, says: "For other duties performed, such of the fees on the higher scale authorized by the 2nd rule of the 38th of the Consolidated General Orders, and the regulations as to solicitors' fees subjoined thereto, as are applicable."

By Consolidated General Order XXXVIII., r. 2, solicitors were entitled to charge the fees set forth in the subjoined regulations as to solicitors' fees, which authorized "for drawing bills of costs, including the copy for the master's office," 8*d.* per folio.

In Morgan and Wurtzburg on Costs, 2nd ed. pp. 835, 917, 921, there are bills of costs, including items for drawing bills of costs, in winding-up cases.

The General Order of 1862 does not now apply to compulsory winding-up: Companies Winding-up Rules, 1890, r. 180. But the Rules of 1890 did not repeal the order, and by rule 17 of the Companies Winding-up Rules, April, 1892, the General Order of 1862 is expressly declared to apply in the case of voluntary winding-up. [He also referred to Rules of the Supreme Court, 1883, Order LXV., r. 27, sub-r. 38 (*b*), and Morgan's Chancery Acts, 3rd ed. pp. 554, 645.]

Cur. adv. vult.

June 3. BUCKLEY J. (after stating the facts). Supposing that there had been no sale by the National Bank to the

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Metropolitan Bank, and that the National Bank had been the party to pay the 3754*l.*, the expense of drawing the bills shewing that this was the amount due must have been borne by the solicitor whose duty it was to prepare the bills, and not by the client. This is not disputed. Does it make any difference that there had been the sale by the National Bank to the Metropolitan Bank? I think not. If, before applying to the Metropolitan Bank for the 3754*l.*, the liquidator had asked his solicitor for his bills of costs, the solicitor must have prepared them at his own expense. I do not think that the incidence of the costs of drawing the bills is shifted by reason of the fact that the liquidator did not ask his solicitor for the bills until a later date—namely, when the Metropolitan Bank asked for them before they would make payment of the 3754*l.*

Further, it seems to me that the 301*l.*, if it was payable to the solicitor, should have been paid, not by the National Bank, but by the Metropolitan Bank, who were the parties liable to indemnify. It seems to me, therefore, that upon this the taxing master was right.

Secondly, for the purpose of taxation under the order of February 21, 1901, the bills to be taxed were drawn at a cost amounting to 73*l.* The liquidator contends that the taxing master was wrong in disallowing this sum. Further, as regards the above item of 301*l.*, the liquidator contends that, assuming he is wrong upon the point as to this item above discussed, still he is entitled to the 301*l.* for considerations similar to those which affect the 73*l.*

In my judgment, this contention fails. The costs of drawing the bill are allowed where there is litigation, or where there is quasi-litigation, by which I mean application for payment out of a fund, application to determine the construction of a will, or the like; but costs of drawing the bill are never allowed when the order is to tax a bill already delivered, or the order is one as between the solicitor and his own client for delivery of a bill and its taxation. The order of February 21, 1901, is an order for taxation of bills for amounts which are stated in the schedule to the order. The bills must have been bills

delivered or prepared for delivery. Mr. Christopher James referred me to rule 70 of the General Order of November, 1862 (which by the 1st schedule entitles solicitors to charge according to the 2nd rule of Order XXXVIII. of the Consolidated General Orders), and to the fees set forth in the regulations subjoined to those orders, and pointed to instances of allowance for drawing bills of costs, including copy for the master's office, and certain forms of bills of costs in Morgan and Wurtzburg on Costs. But I do not find that any of the instances to which he thus refers are applicable to a case such as this, of an order for taxation of delivered bills or bills prepared for delivery, except in a case of litigation or quasi-litigation.

For the above reasons I think that the summons to review the taxation fails, and I dismiss it.

As regards the costs, I must add the following: The liquidator, who is the party to pay the bill, is here to contend that the amount of the bill ought to be increased. It startled me to find that in a case of this kind the liquidator appeared, not by a separate solicitor to attack the bill so far as it ought to be attacked, but by the solicitor whose bill is being taxed, and contended, against the interest of the estate which he represents, for the increase of the amount allowed. But I am told that this is the practice, and that the taxing master—or, now that the matter is before me, the judge—is the only person who is there to reduce the bill. In brief, the applicant is really not the liquidator, but the solicitor. Under these circumstances the applicant will, of course, not be allowed out of the estate any costs of the application.

Solicitors: *Everett & Hodgkinson, for A. T. Williams, Neath.*

F. E.

BUCKLEY J.

1902

June 18, 19.

In re LONDON AND GLOBE FINANCE CORPORATION.

Stockbroker—General Lien—Securities of Customer.

Documents relating to shares belonging to a customer were held by stockbrokers to secure a specific advance of 15,000*l.* When this amount was repaid the documents were left with the brokers, and on subsequent transactions on the Stock Exchange by the customer, acting through the same brokers, losses were made for which the customer was liable to the brokers:—

Held, that although the specific purpose of the deposit had been satisfied by the repayment of the 15,000*l.*, the brokers had a general lien on the shares for the amount due in respect of the Stock Exchange transactions.

In 1900 Blockey & Buckingham were brokers on the London Stock Exchange who acted as brokers for the London and Globe Finance Corporation, Limited. The corporation was entitled to various shares in mining companies, and prior to December 13, 1900, receipts and transfers in respect of the shares had from time to time been deposited by the corporation with Blockey & Buckingham as security for advances. The advances were from time to time paid off and other advances were made, the securities being ultimately, some time before December 13, 1900, deposited with the brokers to secure an advance of 15,000*l.*

The shares, or most of them, were in the possession of the brokers for some considerable time. Most, if not all, of them had been purchased by the brokers for the corporation. Some of them had come into the actual possession of the corporation, and others, so far as the evidence went, had never left the brokers at all, and had remained with them from the first.

The corporation paid off the 15,000*l.* a few days after the loan had been made, but did not call for the return of the securities, which remained in the possession of Blockey & Buckingham until they were declared defaulters on the Stock Exchange. December 13, 1900, was the mid-December account. At that time there were large transactions on the Stock Exchange by the corporation through Blockey & Buckingham as their brokers, and a large number of these transactions were carried

over. Others were settled at the mid-December account, and it was admitted as between the parties that all that was payable on December 13 as between the corporation and the brokers was paid. When December 30—the end of December account—arrived, the speculative transactions which had been carried over on December 10 resulted in a very large loss. The corporation was unable to fulfil its engagements, and the consequence was that Blockey & Buckingham became defaulters on the Stock Exchange. The securities passed into the hands of the official assignee of the Stock Exchange, and, after a compulsory winding-up order had been made against the corporation, by arrangement between him and the official receiver and liquidator, the transfers were completed, and the shares registered in the names of the official assignee and his deputy, subject to the question whether the shares, and the proceeds of some shares which were sold, were subject to a general lien of the brokers for the amount owing by the corporation in respect of its Stock Exchange transactions carried on through Blockey & Buckingham as its brokers.

The official receiver and liquidator took out a summons in the winding-up, asking that 4329 shares in the Caledonian Copper Corporation, and other shares and proceeds of shares, should be transferred, delivered, and released to the applicant, and for a declaration that the same were part of the assets of the corporation, and that neither the official assignee and his deputy nor Blockey & Buckingham had any lien thereon.

Morton Smith, for the official receiver and liquidator. The official assignee of the Stock Exchange will rely upon *Jones* v. *Peppercorne* (1) as shewing that there is a custom, which the Courts will now recognise, by which a stockbroker, who makes a specific advance to his customer on specific securities, has not only a special lien in respect of the loan, but also a general lien in respect of general business transactions, and will contend that the present case is covered by that decision. There the loan was only paid off out of the proceeds of sale of the securities, and on the balance in their hands the brokers claimed a

(1) (1858) Joh. 430.

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lien for money owing in respect of general dealings. The present case is different, for here the purpose for which the shares were deposited with the brokers was to secure a loan of 15,000*l.*, and the money had been repaid some time before the brokers failed.

[BUCKLEY J. The question seems to be whether there was a special contract which would exclude the general custom.]

The special contract was that the securities should be deposited for a special purpose—to secure the specific loan—and, that purpose having been discharged by payment of the loan, the securities could not become subject to a general lien. The same principle applies as in the case of a banker, whose general lien does not arise on securities deposited with him for a special purpose: *Brandao* v. *Barnett.* (1)

[BUCKLEY J. Was not the point in that case that the securities never were in the possession of the person claiming the lien except as agent for the customer? He never held them in his own right. He was merely an agent to receive the interest.]

Where a customer deposited with his bankers a conveyance of two properties, with a memorandum pledging one of them to secure a specific sum and also his general balance, it was held by Kindersley V.-C. that the bankers had no general lien on the other property: *Wylde* v. *Radford.* (2) In that case *Jones* v. *Peppercorne* (3) was cited as an authority for the contention that the general lien applied. Where a customer deposited a policy of assurance with his bankers to secure overdrafts up to a specified amount, and overdrew beyond that amount, it was held that the charge was limited to the amount specified, and that the bankers' general lien was displaced: *In re Bowes.* (4) There North J. distinguished *Jones* v. *Peppercorne* (3), and followed *Wylde* v. *Radford.* (2) The broker has only a general lien on securities which come into his hands in the ordinary course on his buying or selling them for a client. If *Jones* v. *Peppercorne* (3) decides that the fact that securities are deposited to secure a particular transaction does

(1) (1846) 12 Cl. & F. 787.
(2) (1863) 33 L. J. (Ch.) 51.
(3) Joh. 430.
(4) (1886) 33 Ch. D. 586.

not exclude a general lien, the case is in conflict with *Brandao* v. *Barnett* (1), which was approved by the Privy Council in *London Chartered Bank of Australia* v. *White.* (2) When once the securities have been impressed with a special lien, after the person holding them has ceased to hold them subject to that lien, no general lien can arise until there has been a new contract. In the present case, when the special lien was at an end the corporation could have taken the securities away, and they were not left for the purpose of sale or purchase by brokers, and therefore no general lien attached.

Rufus Isaacs, K.C., and *J. R. Atkin*, for the official assignee of the Stock Exchange. The case is governed by *Jones* v. *Peppercorne* (3), which shews that the brokers have a general lien. The general lien is by custom, and it is not displaced by the securities having been deposited for a special purpose which has been answered. In *Brandao* v. *Barnett* (1) there was a mere substitution of bonds. They were never really in the possession of the bankers. In *Wylde* v. *Radford* (4) and *In re Bowes* (5) the general lien was excluded by the express terms of the contract. The applicant has failed to sustain the burden which is on him of shewing any special contract excluding the general lien.

BUCKLEY J. This summons raises a question as between the official receiver, as liquidator of the London and Globe Finance Corporation, Limited, and the official assignee of the Stock Exchange, as representing a firm of brokers, Messrs. Blockey & Buckingham. The question is as to the right to 4329 shares in the Caledonian Copper Corporation. [His Lordship stated the facts, and continued:—]

The point arising for decision is whether the brokers were or were not entitled to hold, under their general lien as brokers, the securities in their hands as security for the amount which, on December 30, 1900, the London and Globe Corporation owed them.

(1) 12 Cl. & F. 787.
(2) (1879) 4 App. Cas. 413.
(3) Joh. 430.
(4) 33 L. J. (Ch.) 51.
(5) 33 Ch. D. 586.

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LONDON AND GLOBE FINANCE CORPORATION, *In re.*

As to the law, I do not think that there is any room for doubt. *Jones* v. *Peppercorne* (1) is a decision—pronounced in the year 1858, and which has been regarded as well settling the law ever since—to the effect that brokers and bankers have a general lien on securities in their hands, as between themselves and the customer, for the balance due from the customer to the broker. That is not disputed. Mr. Morton Smith has relied upon *Wylde* v. *Radford* (2) and *In re Bowes* (3) as establishing something which distinguishes them from *Jones* v. *Peppercorne* (1), and which he says is available in his favour. I confess that I cannot see it. *Wylde* v. *Radford* (2) is this. There was a deposit of deeds. One of the deeds, a deed of conveyance, included two properties, property A and property B. The deposit of deeds was accompanied by a memorandum pledging property A as security for a specified sum and also for the customer's general balance. All that Kindersley V.-C. held was that, upon the true construction of the memorandum, the result of the transaction in that case was that property B was never intended to be charged at all; that the deed was deposited because it contained A, and not because it contained B; and that as regarded B there was no security given. In *In re Bowes* (3) a policy of life assurance for a sum of 5000*l.* was deposited with bankers, with a memorandum which expressed the deposit to be security for all sums due upon general account, "not exceeding in the whole at any one time 4000*l.*" and interest. The only question was whether there was a general lien for something beyond the 4000*l.* and interest. North J. held that there was not—that is to say, that upon the construction of the memorandum the general lien which there would have been unless it had been excluded was excluded by the contract between the parties. Here there is nothing at all to exclude the general lien, which it is not, and cannot be, disputed exists. The transactions as between the customer and the broker resulted in a sum owing by the customer to the broker, and there were in the possession of the broker securities which had come into his hands in the course of his business as

(1) Joh. 430. (2) 33 L. J. (Ch.) 51.
(3) 33 Ch. D. 586.

broker of the customer. It is a well-established principle that the broker has as against the customer the right to hold those securities for the amount due.

Under those circumstances this summons, which asks for a declaration that the official receiver—that is to say, the customer—is entitled as against the official assignee—that is to say, the broker—fails, and I dismiss it with costs.

Solicitors for applicant: *Michael Abrahams, Sons & Co.*

Solicitors for respondent: *Travers-Smith, Braithwaite & Robinson.*

F. E.

PERCIVAL *v.* WRIGHT.

[1901 P. 1375.]

Company—Directors—Fiduciary Position—Purchase of Shares—Negotiations for Sale of Undertaking—Obligation to Disclose.

The directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertaking.

WITNESS ACTION.

This was an action to set aside a sale of shares in a limited company, on the ground that the purchasers, being directors, ought to have informed their vendor shareholders of certain pending negotiations for the sale of the company's undertaking.

In and prior to October, 1900, the plaintiffs were the joint registered owners of 253 shares of 10*l.* each (with 9*l.* 8*s.* paid up) in a colliery company called Nixon's Navigation Company, Limited.

The objects of the company, as defined by the memorandum of association, included the disposal by sale of all or any of the property of the company. The board of directors were empowered to exercise all powers not declared to be exercisable by general meetings; but no sale of the company's collieries could be made without the sanction of a special resolution.

The shares of the company, which were in few hands and

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were transferable only with the approval of the board of directors, had no market price and were not quoted on the Stock Exchange.

On October 8, 1900, the plaintiffs' solicitors wrote to the secretary of the company asking if he knew of any one disposed to purchase shares.

On October 15, 1900, in answer to the secretary's inquiry as to what price they were prepared to accept, the plaintiffs' solicitors wrote stating that the plaintiffs would be disposed to entertain offers of 12*l.* 5*s.* per share. This price was based on a valuation which the plaintiffs had obtained from independent valuers some months previously.

On October 17, 1900, the chairman of the company wrote to the plaintiffs' solicitors stating that their letter of October 15 had been handed to him, and that he would take the shares at 12*l.* 5*s.*

On October 20, 1900, the plaintiffs' solicitors having taken a fresh valuation, replied that the plaintiffs were prepared to accept 12*l.* 10*s.* per share.

On October 22, 1900, the chairman wrote accepting that offer, and stating that the shares would be divided into three lots.

On October 24, 1900, the chairman wrote stating that eighty-five shares were to be transferred to himself and eighty-four shares apiece to two other named directors.

The transfers having been approved by the board, the transaction was completed.

The plaintiffs subsequently discovered that, prior to and during their own negotiations for sale, the chairman and the board were being approached by one Holden with a view to the purchase of the entire undertaking of the company, which Holden wished to resell at a profit to a new company. Various prices were successively suggested by Holden, all of which represented considerably over 12*l.* 10*s.* per share; but no firm offer was ever made which the board could lay before the shareholders, and the negotiations ultimately proved abortive. The Court was not in fact satisfied on the evidence that the board ever intended to sell.

The plaintiffs brought this action against the chairman and the two other purchasing directors, asking to have the sale set aside on the ground that the defendants as directors ought to have disclosed the negotiations with Holden when treating for the purchase of the plaintiffs' shares.

Eve, K.C., and *Vaughan Hawkins*, for the plaintiffs. There is no suggestion of unfair dealing or purchase at an undervalue; but the defendants as directors were in a fiduciary position towards the plaintiffs, and ought to have disclosed the negotiations for sale of the undertaking, in which case the plaintiffs would have retained their shares, on the chance of that sale going through.

The primâ facie obligation of directors purchasing shares to disclose all information as to the shares is, no doubt, tacitly released as to information acquired in the ordinary course of management. The defendants, for instance, would not have been bound to disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend. But that release did not relieve them from disclosing the special information acquired during their negotiations for the sale of the entire undertaking. At the commencement of those negotiations they became trustees for sale for the benefit of the company and the shareholders, and could not purchase the interest of an ultimate beneficiary without disclosing those negotiations: *Fox* v. *Mackreth* (1); *Ex parte Lacey*. (2)

[SWINFEN EADY J. Assuming that directors are, in a sense, trustees for the company, are they trustees for individual shareholders?]

They are trustees both for the company and for the shareholders who are the real beneficiaries. No question of privity can arise in the case of trusts: Lindley on Companies, 5th ed. p. 364; Buckley on Companies, 8th ed. p. 560; *York and North Midland Ry. Co.* v. *Hudson* (3); *Ferguson* v. *Wilson* (4); *Wilson* v. *Lord Bury* (5); *In re German Mining Co.* (6)

(1) (1791) 2 W. & T. 7th ed. p. 709; 2 Cox, 320; 2 Bro. C. C. 400; 4 Bro. P. C. 258; 2 R. R. 55.
(2) (1802) 6 Ves. 625; 6 R. R. 9.
(3) (1853) 16 Beav. 485, 491, 496.
(4) (1866) L. R. 2 Ch. 77, 90.
(5) (1880) 5 Q. B. D. 518, 527.
(6) (1853) 4 D. M. & G. 19.

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Now, "a share in a company, like a share in a partnership, is a definite proportion of the joint estate, after it has been turned into money, and applied as far as may be necessary in payment of the joint debts": Lindley on Companies, 5th ed. p. 449; *Watson* v. *Spratley*. (1) The undertaking of the company is, therefore, merely the sum of the shares. No doubt at law it belongs to the company, but in equity it belongs to the shareholders, and the directors as trustees for sale of the undertaking cannot purchase the interest of a beneficiary without giving him full information. In this respect the shareholders inter se are in the same position as partners, or shareholders in an unincorporated company. If managing partners employ an agent to sell their business, he cannot purchase the share of a sleeping partner without disclosing the fact of his employment. Incorporation cannot affect this broad equitable principle. It does not alter the rights of the shareholders inter se, though it affects their relations to the external world.

In the present case the plaintiffs knew that the directors were managing the business, but not that they were negotiating a sale of the undertaking, and the non-disclosure of the latter fact entitles them to set aside the sale of their shares.

Hon. E. C. Macnaghten, K.C., and *Mark Romer*, for the defendants. Even if the directors were trustees for sale of the undertaking, they were not trustees for sale of the plaintiffs' shares. The suggested equity has never been applied between a director and a shareholder, although a director purchasing shares must always purchase from a shareholder. The company is a legal entity quite distinct from the shareholders: *Salomon* v. *Salomon & Co.* (2); so that a sale by a mortgagee to a company in which he is a shareholder is neither in form or substance a sale to himself: *Farrar* v. *Farrars, Limited* (3); and a sale by a company to a shareholder cannot be impeached on the ground that the resolution authorizing that sale was carried by the votes of that shareholder: *North Western Transportation Co.* v. *Beatty*. (4) The principle underlying these decisions is quite inconsistent with the plaintiffs' contention.

Eve, K.C., in reply.

(1) (1854) 10 Ex. 222.
(2) [1897] A. C. 22, 42, 51.
(3) (1888) 40 Ch. D. 395.
(4) (1887) 12 App. Cas. 589.

SWINFEN EADY J. The position of the directors of a company has often been considered and explained by many eminent equity judges. In *Great Eastern Ry. Co.* v. *Turner* (1) Lord Selborne L.C. points out the twofold position which directors fill. He says: "The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company." In *In re Forest of Dean Coal Mining Co.* (2) Jessel M.R. says: "Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners." Again, in *In re Lands Allotment Co.* (3), Lindley L.J. says: "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees."

It was from this point of view that *York and North Midland Ry. Co.* v. *Hudson* (4) and *Parker* v. *McKenna* (5) were decided. Directors must dispose of their company's shares on the best terms obtainable, and must not allot them to themselves or their friends at a lower price in order to obtain a personal benefit. They must act bonâ fide for the interests of the company.

The plaintiffs' contention in the present case goes far beyond this. It is urged that the directors hold a fiduciary position as trustees for the individual shareholders, and that, where negotiations for sale of the undertaking are on foot, they are

(1) (1872) L. R. 8 Ch. 149, 152.
(2) (1878) 10 Ch. D. 450, 453.
(3) [1894] 1 Ch. 616, 631.
(4) 16 Beav. 485, 491, 496.
(5) (1874) L. R. 10 Ch. 96.

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in the position of trustees for sale. The plaintiffs admitted that this fiduciary position did not stand in the way of any dealing between a director and a shareholder before the question of sale of the undertaking had arisen, but contended that as soon as that question arose the position was altered. No authority was cited for that proposition, and I am unable to adopt the view that any line should be drawn at that point. It is contended that a shareholder knows that the directors are managing the business of the company in the ordinary course of management, and impliedly releases them from any obligation to disclose any information so acquired. That is to say, a director purchasing shares need not disclose a large casual profit, the discovery of a new vein, or the prospect of a good dividend in the immediate future, and similarly a director selling shares need not disclose losses, these being merely incidents in the ordinary course of management. But it is urged that, as soon as negotiations for the sale of the undertaking are on foot, the position is altered. Why? The true rule is that a shareholder is fixed with knowledge of all the directors' powers, and has no more reason to assume that they are not negotiating a sale of the undertaking than to assume that they are not exercising any other power. It was strenuously urged that, though incorporation affected the relations of the shareholders to the external world, the company thereby becoming a distinct entity, the position of the shareholders inter se was not affected, and was the same as that of partners or shareholders in an unincorporated company. I am unable to adopt that view. I am therefore of opinion that the purchasing directors were under no obligation to disclose to their vendor shareholders the negotiations which ultimately proved abortive. The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations, a premature disclosure of which might well be against the best interests of the company. I am of opinion that directors are not in that position.

There is no question of unfair dealing in this case. The directors did not approach the shareholders with the view

of obtaining their shares. The shareholders approached the directors, and named the price at which they were desirous of selling. The plaintiffs' case wholly fails, and must be dismissed with costs.

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Solicitors: *Eyre, Dowling & Co.; Ince, Colt & Ince.*

G. R. A.

BAXENDALE *v.* NORTH LAMBETH LIBERAL AND RADICAL CLUB, LIMITED.

SWINFEN EADY J.
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June 5, 6, 7, 9, 24.

[1902 B. 274.]

Right of Way—Grant—"Executors, Administrators, and Assigns, Undertenants and Servants"—Licensees.

A grant of a right of way extends to all licensees of the grantee lawfully going to and from the dominant tenement, although the grantee, "his executors, administrators, and assigns, undertenants and servants," are the only persons specified in the grant.

WITNESS ACTION.

This was an action by the lessee of Blackacre against the defendant club and one of its members claiming (inter alia) an injunction to restrain the members, honorary members, guests, visitors, officers, and tradespeople of the defendant club, the present lessee of Whiteacre, from using a passage across Blackacre as a carriage or foot way from Whiteacre into a public road.

The defendant club, a society registered and incorporated under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), had recently built a workmen's club on Whiteacre, the only present access to which was over the passage in dispute. There were a large number of members, each of whom had liberty to introduce a guest, in addition to which all associates of the Working Men's Club and Institute Union, Limited, were entitled to be honorary members and to the free use of the club.

The right of way was claimed under a lease of November 8, 1879, by which the common owner of Blackacre and Whiteacre

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demised Whiteacre to the predecessor in title of the defendant club for a term of forty years less two days from March 27, 1877, "together with a full and free right and liberty for the lessee, his executors, administrators, and assigns, undertenants and servants, from time to time and at all times hereafter at his and their will and pleasure, for all purposes connected with the use and enjoyment of the said premises, to go, return, pass, and repass in, along, and over" the said passage into the said road.

The lease contemplated the erection of buildings, and there was nothing to prohibit their user for the purposes of a workmen's club.

The plaintiff, whose lease was subject to the right of way, contended (inter alia) that the members, honorary members, guests, visitors, officers, and tradespeople of the club were mere licensees and not within the above grant.

Eve, K.C., and *Leverson*, for the plaintiff. The grant is confined to the lessee, his executors, administrators, and assigns, undertenants and servants. It does not follow the wider forms of some of the conveyancing precedents which mention "friends" (3 Bythewood and Jarman, 4th ed. p. 604); "visitors" (2 Davidson, pt. 1, 4th ed. p. 527; 1 Key and Elphinstone, 7th ed. p. 738); "agents and workmen" (1 Key and Elphinstone, 7th ed. p. 838); "persons authorized" by the grantee (3 Bythewood and Jarman, 4th ed. p. 572; 1 Prideaux, 18th ed. p. 387); or "other persons and person for the benefit and advantage of" the grantee (2 Davidson, pt. 1, 4th ed. p. 266; 5 Bythewood and Jarman, 4th ed. p. 543). These words cannot be mere surplusage.

In any case the user of the way must be reasonable: 5 Davidson, pt. 1, 3rd ed. p. 144; and that is a question for the Court as a judge of fact: *Hawkins* v. *Carbines*. (1)

Vernon Smith, K.C., and *Howland Jackson*, for the defendants. The way being appurtenant to Whiteacre may clearly be used by any person entitled to go there for any reasonable purpose: *Cannon* v. *Villars*. (2) If a church had been built on Whiteacre, the congregation could have used the way. The

(1) (1857) 27 L. J. (Ex.) 44. (2) (1878) 8 Ch. D. 415.

way is in fact only used for the reasonable purposes of the club.

In *Mitcalfe* v. *Westaway* (1) the words "assigns, officers, servants, and workmen" were held to include licensees.

Eve, K.C., in reply. Even if the grant impliedly extends to licensees, it cannot be intended to extend to an unreasonable number, such as all the members of the club. The case would then be analogous to the right of an occupier of a house in a square. He may take two or three visitors into the garden, but he must not give a garden-party.

Cur. adv. vult.

June 24. SWINFEN EADY J. It is contended that the right of way extends only to the grantee and his tenants and servants, and does not include the members of the club, who number some 374, and honorary members (associates of the Working Men's Club and Institute Union, Limited), who may number very many more, and that there is no authority for holding that a grant of a right of way extends to all licensees of the grantee.

I am of opinion that the grant of a right of way to premises which may be and are being lawfully used as a workmen's club extends to all persons lawfully going to and from the club, and includes the members of the club, associates, tradespeople, and servants. Reliance was placed upon the fact that in certain precedents in the books of grants of way "visitors" and "persons authorized" are expressly mentioned; but it cannot be doubted that in the ordinary case of a grant of a right of way to a house and premises which may only be used as a private dwelling-house, the right would extend not only to the grantee, but to members of his family, servants, visitors, guests, and tradespeople, even though none of these persons be expressly mentioned in the grant. At the time of this grant the passage in question was adapted for and was capable of being used by carts and carriages, and the necessary or reasonable user of the club premises as a club requires that there should be liberty of passing over the passage in question for the persons and

(1) (1864) 34 L. J. (C.P.) 113.

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vehicles shewn to have used it: see *Cannon* v. *Villars*. (1) [His Lordship having then dealt with a question of nuisance or annoyance, which he held was not substantiated, continued:—] The result is that the defendants are only using their premises in a usual and ordinary manner within their legal rights, and that the passage is used in a reasonable manner, having regard to the lawful existence of the club. The action fails, and must be dismissed with costs.

Solicitors: *Upton, Atkey & Co.; Chalton Hubbard.*

G. R. A.

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BUCKLEY J.
July 5, 6.
C. A.
1902
May 12, 13 14, 15.

BRADSHAW *v.* WIDDRINGTON.

[1900 B. 4132.]

Statute of Limitations—Mortgage—Acknowledgment—Payment of Interest "by the Person by whom the same shall be payable"—Person "bound to pay"—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The solicitor who acted for a mortgagor and after his death for his executors, and also for the mortgagees, paid the interest upon the mortgage debt to the mortgagees regularly up to a period within twelve years before the commencement of an action to enforce the mortgage:—

Held, that this was primâ facie a payment, within s. 8 of the Real Property Limitation Act, 1874, "by the person by whom the same shall be payable," so as to throw on the representatives of the mortgagor the onus of proving that the statute had run and the mortgage debt had not been kept alive:

Held, also, that the payment of interest by a person who, as between himself and the mortgagor, was bound to pay it, though he was under no contract with the mortgagee to do so, was a payment "by the person by whom the same shall be payable" within the meaning of s. 8, so as to prevent the statute from running.

Decision of Buckley J. affirmed.

Harlock v. *Ashberry*, (1882) 19 Ch. D. 539, considered and explained.

THE question in this case was, whether the rights of mortgagees, the defendants to the action, under their mortgage had been barred by the Statute of Limitations.

On August 1, 1879, J. E. Bradshaw, being seised in fee of the Fair Oak estate, executed in favour of the Rev. J. J. Moss

(1) 8 Ch. D. 415.

a mortgage of that estate to secure 5171*l.* 14*s.* 6*d.*, with interest thereon at 4 per cent. per annum. Moss was the surviving executor and trustee of the will of Sir Edward Cust, and the mortgage money was in fact money belonging to that trust.

On the same day, August 1, 1879, William Bradshaw, a son of J. E. Bradshaw, executed in favour of his father a bond for 10,000*l.*, which was conditioned to become void upon payment by William Bradshaw to his father of 5171*l.* 14*s.* 6*d.*, with interest thereon at 4 per cent. per annum.

In these transactions Mr. Cartmell Harrison, a partner in the firm of Birch, Ingram & Harrison, and their successors in business, acted as solicitor for J. E. Bradshaw and for W. Bradshaw, as well as for the Cust trustees.

Moss died on February 23, 1887, and the defendants were his representatives.

On September 16, 1887, J. E. Bradshaw died. His son W. Bradshaw and Harrison were his executors and trustees. Interest on the mortgage debt was in fact paid by Harrison to the Cust trustees down to 1899, when he committed suicide, and it was then discovered that he had been guilty of a number of frauds. He had down to the time of his death acted as solicitor for the executors of J. E. Bradshaw. At the time of his death J. C. Bradshaw, another son of J. E. Bradshaw, was in possession of the Fair Oak estate, which had been conveyed to him for value free from incumbrances, as to part by his father in 1884, and as to the remainder by his executors and trustees in 1887 after his death, in both cases without notice to J. C. Bradshaw of the mortgage to the Cust trustees. Harrison acted as solicitor for J. C. Bradshaw also, and had throughout possession of the title-deeds of the property.

On August 14, 1900, the Cust trustees gave notice to J. C. Bradshaw to pay off the mortgage debt, threatening in default of payment to sell the mortgaged estate. Thereupon, on October 3, 1900, this action was commenced by J. C. Bradshaw against the Cust trustees.

The statement of claim alleged that the plaintiff had not by himself or his agent made any payment of principal or interest or given any acknowledgment to J. J. Moss, or to the defendants

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or either of them, or to the agent of any of them, in respect of the mortgage, and the plaintiff alleged that all moneys (if any) thereby secured had been duly satisfied, and alternatively he relied on the Statutes of Limitation. The plaintiff claimed a declaration that the right and title (if any existed) of the defendants as mortgagees under and by virtue of the mortgage in the Fair Oak estate was extinguished, and that the charge (if any) thereby created was to be deemed satisfied; delivery of the title-deeds to the plaintiff; and an injunction to restrain the defendants from selling the estate and from dealing with the legal estate therein, and from parting with the title-deeds.

By their defence the Cust trustees insisted on the validity and the continued existence of the mortgage. And they delivered a counter-claim, to which J. C. Bradshaw and W. Bradshaw were made defendants, by which they claimed, as against W. Bradshaw, as surviving executor of J. E. Bradshaw, payment of the mortgage debt, with interest; and as against J. C. Bradshaw, that the mortgage might be enforced by foreclosure or sale.

At the trial W. Bradshaw was not called as a witness.

The books of the solicitors shewed that in an account between them and W. Bradshaw he had been charged with the interest on the mortgage debt as paid by him to his father down to the year 1885, and after that as paid by him direct to the Cust trustees. In the solicitors' account with the father he was not treated as receiving the interest from his son W. Bradshaw, or as paying interest to the Cust trustees. The father was only treated as receiving the mortgage money and paying it over to his son. It also appeared that W. Bradshaw had been charged with the costs of and incident to the mortgage. It further appeared that in 1892 W. Bradshaw had paid to Harrison the amount of the mortgage debt, and that in the solicitors' account with the Cust trustees they were credited with this sum. In fact it was never paid by Harrison to the Cust trustees, and he continued to pay them interest upon it down to the time of his death.

There was in the solicitors' books some trace of a mortgage

which seemed to have been prepared and intended to have been executed by the father to Harrison for the purpose of securing the 5171*l.* 14*s.* 6*d.* upon part of the Fair Oak estate, and, as Buckley J. said, it was possible that the father was persuaded that he had transferred the incumbrance from the whole estate to that part of it which he was not going to convey in 1884 to his son J. C. Bradshaw, and that he was thus in a position to convey the other part free from incumbrances. Harrison's books shewed that he charged for the preparation and execution of this supposed mortgage, but there was nothing else to shew that such a deed existed.

After the death of Harrison in November, 1899, it appeared that the mortgage to the Cust trustees was still subsisting. Meanwhile J. C. Bradshaw had been in possession of the estate for many years, knowing nothing of the mortgage.

No imputation of fraud was made against either J. E. Bradshaw or W. Bradshaw with regard to the execution of the conveyances to J. C. Bradshaw.

The action and the counter-claim were tried by Buckley J. on July 5, 6, 1901.

H. Terrell, K.C., and *Kenneth F. Wood*, for the plaintiff. Payment of interest by William Bradshaw to the Cust trustees did not operate to keep alive the mortgage against the mortgagor J. E. Bradshaw, who never paid any interest, or against his estate. In order to take the case out of the Statutes of Limitation there must be, under s. 8 (1) of the Real Property

(1) By s. 8, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

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Limitation Act, 1874, a payment or acknowledgment by the "person by whom the same shall be payable or his agent." That means, that there must have been a payment by the mortgagor, or by some other person bound as between himself and the mortgagee to pay the principal and interest. Payment by a stranger will not do: *Harlock* v. *Ashberry* (1); *Lewin* v. *Wilson* (2); *Newbould* v. *Smith*. (3) There was no contract between the Cust trustees and William Bradshaw.

Astbury, *K.C.*, and *Bryan Farrer*, for the Cust trustees. Sect. 8 of the Act of 1874 is an enactment for the limitation of actions, not for the extinguishment of rights. The mortgagee's estate in the land is not extinguished if he can put it to any use aliunde. For instance, an executor can retain a barred debt. The only section which extinguishes any rights is s. 34 of the Real Property Limitation Act, 1833, and that does not apply to mortgages: *Sands* to *Thompson*. (4) Sect. 8 does not say that the payment or acknowledgment must be by the mortgagor, but by the person by whom the same shall be payable. That means the mortgagor, or any person bound to him to pay: *Chinnery* v. *Evans* (5); *Harlock* v. *Ashberry*. (1) A surety for the mortgagor can bind the estate: *In re Frisby*. (6) There is nothing in s. 8 to shew that the person by whom the same shall be payable must be liable to the mortgagee ex contractu. A person who is a stranger to the mortgagee, but is bound by contract to the mortgagor, can make an acknowledgment. Such a person although unknown to the mortgagee is not really a stranger to him. When J. E. Bradshaw sold this property to J. C. Bradshaw free from incumbrances he became bound to indemnify him. The solicitors' books shew that J. E. Bradshaw's executors, of whom Harrison, a member of the firm, was one, paid interest to the Cust trustees, and that would operate as an acknowledgment.

Birrell, *K.C.*, and *G. Henderson*, for William Bradshaw.

H. Terrell, *K.C.*, in reply.

(1) 19 Ch. D. 539.
(2) (1886) 11 App. Cas. 639.
(3) (1885) 29 Ch. D. 882; (1886) 33 Ch. D. 127.
(4) (1883) 22 Ch. D. 614.
(5) (1864) 11 H. L. C. 115.
(6) (1889) 43 Ch. D. 106.

BUCKLEY J., after stating the material facts, continued:— I suppose that what in fact happened in 1892 was that W. Bradshaw paid Harrison the mortgage money, and that the latter did not pay it to the Cust trustees, but misappropriated it, and, of course, it was necessary to continue paying them the interest. The interest was in fact paid to the trustees down to 1899. W. Bradshaw, though he is a party to this action, has not been called to explain the transactions between himself and his father in 1879. Harrison is dead; J. E. Bradshaw is dead; W. Bradshaw is the one person who could give an explanation. Neither the plaintiff's nor the defendants' counsel have thought proper to call him. Upon the materials which I have before me, I arrive at the conclusion that the father borrowed the money for the son, and that, as between the father and the son, the latter was the person liable to pay the interest. For that reason, of course, the father is never treated in the accounts as paying the interest or as liable for it, and I conclude that there was, as between the father and the son, an arrangement by which the son, having had the money, should keep down the interest. [His Lordship then referred to the conveyance to J. C. Bradshaw in 1884, and continued:—]

The Cust mortgage was in fact then a subsisting incumbrance, and the father could not convey free from incumbrances; but, as between himself and J. C. Bradshaw, he purported to do so. How that came about is a little difficult to explain. It may be that the father was persuaded that he had transferred the incumbrance from the entirety of the estate to that part of it which he was not going to convey to J. C. Bradshaw, and was in a position to convey to him free from incumbrances. J. C. Bradshaw was, however, a purchaser for value without notice of the mortgage to the Cust trustees, and he is entitled to all the rights of a purchaser. It resulted that, as between the father and J. C. Bradshaw the son, the father was bound to discharge the mortgage debt and to keep down the interest on it, and to indemnify the son. He had purported to give the son an estate free from incumbrances, and he had not given it, and, as between them, it rested upon the father

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to keep down the interest upon the mortgage debt and to pay the principal. Before July, 1885, W. Bradshaw borrowed further sums from his father—two sums of 2000*l.* and one of 6000*l.*, making a total of 10,000*l.*—and he thus became indebted to his father in 15,171*l.* 14*s.* 6*d.*, and on July 17, 1885, he executed a bond for that sum, in which the 5171*l.* 14*s.* 6*d.* was included. For the present purpose, it is the same thing as if the bond of August 1, 1879, had remained. [His Lordship then referred to the conveyance of 1887 by the executors and trustees of J. E. Bradshaw to J. C. Bradshaw, and continued:—]

The question to be determined is which of two innocent parties—J. C. Bradshaw, who purchased the Fair Oak estate without any knowledge of the mortgage, and the Cust trustees, who advanced their money upon the mortgage and received their interest down to 1899—is to suffer from the fraud of Harrison.

Now, the question thus to be determined between the parties turns, it seems to me, upon the proper effect of s. 8 of the statute 37 & 38 Vict. c. 57, and the question which I have to investigate is, whether the interest which the Cust trustees have thus received, down to a date well within the twelve years of the statute, has been paid by the person by whom the same is payable or his agent.

The whole basis and principle of all the Statutes of Limitation is that a payment, to take a case out of the statutes, must be a payment by a person liable as an acknowledgment of right. The whole idea is that the payment is an admission of the right of the person to whom it is paid, and what I have to look to is whether the payment here has been made by a person bound to pay it, and whether by that expression "by a person bound to pay it" I must find that he is a person bound between himself and the mortgagee to pay it, or whether the proposition is not satisfied if it be paid by a person who, as between himself and the mortgagor, is bound to pay it. Now, looking upon it upon principle, in the first instance, apart from authority, it seems to me that all principle and common sense lead to the conclusion that it is sufficient that the payment be

made by a person who, as between himself and the mortgagor, is bound to pay. You have to see whether the mortgagor has made an admission. That is the basis of it all. If the mortgagor has himself paid, or whether he has called upon somebody else and bound somebody else towards him to pay and that person has paid, equally, as it appears to me, the mortgagor has made an admission. That is how I regard it upon principle.

How does it stand as regards the authorities? When you look at the authorities, it appears to me that that really is their effect. Not that I have been able to put my hand upon a case in which that exact point has arisen, but I find that that is the language which learned judges have used in many cases. Take first *Chinnery* v. *Evans*. (1) There the payment was made by a receiver, who had been appointed on a petition presented by the mortgagee. He was receiver of certain estates in Ireland. Lord Westbury L.C., in advising the House, used this language as to the position of the receiver (2): "Upon that point I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order, is payment in law by the legal agent of the person liable to pay." So he is not dealing with a case in which the person is not the agent of the mortgagor. He says he is the agent of the mortgagor, so that it is not a case directly in point upon the question which I have to determine here. But I find that this language is used by Lord Cranworth in the same case, and, as I am going to shew when I come to *Harlock* v. *Ashberry* (3), this form of words is relied upon in the judgment in that case. Lord Cranworth said (4): "The payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute (11 & 12 Geo. 3, c. 10) is an officer of the Court, yet he is certainly no stranger to the mortgagor, but a person paying for him and on his account

(1) 11 H. L. C. 115.
(2) Ibid. 134.
(3) 19 Ch. D. 539.
(4) 11 H. L. C. 139.

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what he is bound to pay." The context in which that language occurs is this: If a mere stranger to the whole transaction—to both mortgagor and mortgagee—comes and pays, that is not an admission at all; if a mere outsider, a stranger to both, comes and pays, that is no admission; but, if a person, who is not a stranger to the mortgagor (that is what Lord Cranworth says) comes and pays, that will do for the purposes of the statute. Then I pass to *Harlock* v. *Ashberry*. (1) The point there was, that a mortgagee had obtained payment of rent from a tenant. Of course he was entitled to go into possession, and take the rents if he liked adversely to the mortgagor and everybody, and he did so, and the question was whether money which he thus got from the tenant was a payment for the purpose of excluding the statute; and the Court held it was not, because it was not obtained from the mortgagor, or any person bound towards the mortgagor to pay the mortgagee, but from a tenant, and simply obtained by the mortgagee entering into possession of the property. That was the question which the Court had to decide; but in delivering judgment upon that I find that Jessel M.R. (2) read the passage from *Chinnery* v. *Evans* (3) which I have just quoted, and then went on to say: "Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment." Now, what did Jessel M.R. there mean by "bound"? Did he mean "bound towards the mortgagee"? I think not, because he had just read language in which Lord Cranworth had commented upon the fact that the receiver was no stranger—not to the mortgagee, but to the mortgagor—and I think he meant a payment by a person who is bound as between himself and the mortgagor to pay the interest upon the mortgage money. Then, when I come to the judgment of Brett L.J., it seems to me that this is more plain. He said (4): "Then the question arises whether payment of rent by a tenant to a mortgagee who has

(1) 19 Ch. D. 539.
(2) Ibid. 546.
(3) 11 H. L. C. 115.
(4) 19 Ch. D. 547.

exercised the right to demand the rent, is a payment of principal and interest within that section. I come to the conclusion that it is not, for three reasons"; and the third reason is this: "But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest, to be a payment within this section, must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans*. (1) The question may be asked, Why must this payment be by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest on his behalf? It seems to me the reason is that in all Statutes of Limitations the principle on which they are founded is that in those cases in which a payment is allowed to take the case out of the operation of the Statute of Limitations it must be such a payment as amounts to an acknowledgment of liability." Now, what did the Lord Justice mean there by "bound"? Bound, I conceive, as between that person and the mortgagor—"bound," he says, "to make a payment for the mortgagor." And, again, he said (2): "On the ordinary rules of construction, and on the authority of *Chinnery* v. *Evans* (1), I feel bound to say that a payment, to come within 1 Vict. c. 28, must be a payment by a person liable as mortgagor or some person on his behalf, or such a person as was the receiver—a person entitled to pay on his behalf," that is, a person entitled by reason of the relations between himself and the mortgagor to pay money on his behalf. It seems to me, therefore, that the whole of the language of those judgments is in favour of the view which I take, and that the principle is that the person bound to pay, and whose payment is material for the purposes of the statute, is—not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor.

I need only add to those passages this from *Lewin* v.

(1) 11 H. L. C. 115. (2) 19 Ch. D. 549.

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Wilson (1), where Lord Hobhouse, in delivering the judgment of the Privy Council, after referring to *Chinnery* v. *Evans* (2) and *Harlock* v. *Ashberry* (3), said (4): "Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent," and there is no such authority to be found as far as I know. Here I agree that payment was not made by the mortgagor, James Edward Bradshaw. Whether it was made by his agent or not is another matter. For the present purpose I am assuming that William Bradshaw was not his agent. Assuming that he was not his agent, still it was made by William, who was, I think, as between himself and his father, the person who was bound to pay. Inasmuch as that was so, William's payment, made in pursuance of his contractual obligations towards his father, was, as it appears to me, his father's admission of liability.

Another ground has been put forward which is very ingenious, and upon which I think I ought to say a word. James Edward Bradshaw, the mortgagor, died in September, 1887, and, as I have said, William Bradshaw and Cartmell Harrison were his executors. As from 1887 William Bradshaw continued to pay the interest in this sense, that Harrison, as his solicitor passing the accounts through his book, charged William Bradshaw with the interest which Harrison in fact was paying to the Cust trustees or the Cust beneficiaries. After 1887 William Bradshaw, the person thus making the payments, was the person liable to pay as mortgagor, in the sense that he was legal personal representative of the mortgagor, and Harrison, the other person to whom William was making the payment, or who was making the payment for William, was the other executor. So that, if William had paid the money to Harrison, or rather to himself and Harrison as co-executors, and they had paid it over to the Cust trustees or beneficiaries, that would have been a payment by James

(1) 11 App. Cas. 639.
(2) 11 H. L. C. 115.
(3) 19 Ch. D. 539.
(4) 11 App. Cas. 644.

Edward Bradshaw, the mortgagor. It appears to me there is something in that contention. As from 1887 the persons liable as mortgagors to pay were William Bradshaw and another, and the persons paying were William Bradshaw and that other, in that William Bradshaw found the money, and it passed through the hands of the other, and the other paid the mortgagees, and J. E. Bradshaw, by his legal personal representatives, was thus paying them from 1887 onwards.

The result is that the action must be dismissed, and that upon their counter-claim the Cust trustees are entitled to the relief which they ask, namely, to enforce the money debt against the estate of the mortgagor, and as against the land foreclosure or sale.

H. C. R.

C. A.

From this decision J. C. Bradshaw and W. Bradshaw appealed. The appeal came on for hearing on May 12, 1902.

H. Terrell, K.C., and *George Henderson*, for the appellants. The appellants have to shew that the Real Property Limitation Act, 1874, s. 8, commenced to run in their favour and against the Cust trustees prior to 1892; and the question is, whether the interest paid by W. Bradshaw, through his solicitors, on the mortgage of 1879 was so paid by him as the duly authorized agent of J. E. Bradshaw, the mortgagor. The onus is on the Cust trustees to prove that within twelve years from the time of action brought principal or interest was paid by the person liable to pay. First, with regard to the claim against the estate, the right to recover the estate within the twelve years is regulated by s. 1 of the Act of 1874, which is, by s. 9 of that Act, substituted for s. 2 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), a section which is supplemented, as to mortgages, by the Real Property Limitation Act, 1837 (7 Will. 4 and 1 Vict. c. 28). Under s. 34 of the Act of 1833, at the end of the period limited to any person for making entry or distress, his title to the land is absolutely extinguished. Secondly, as to the remedy against the person under any covenant, that is regulated by s. 8 of the Act of 1874, which is a re-enactment of, and by s. 9 is substituted for, s. 40 of the

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Act of 1833, the period of twenty years under that section being reduced by s. 8 to twelve. Under that s. 8 also the onus is on the person seeking to escape from the statute to prove payment within the twelve years: *Loveless* v. *Richardson* (1), a case on s. 40 of the Act of 1833. In order to prevent the statute from running, the person claiming must shew that some principal or interest has been paid, or an acknowledgment given, either by the mortgagor or by some one duly authorized on his behalf to do so: payment by a stranger is not sufficient. That is now well settled: *Chinnery* v. *Evans* (2); *Harlock* v. *Ashberry* (3); *Astbury* v. *Astbury* (4); *Lewin* v. *Wilson* (5); *In re Lord Clifden.* (6) Here the Cust trustees were in no way bound to receive payment from W. Bradshaw, for there was no privity of contract between them. He was not liable to them under any covenant, and could not insist upon paying them. It is clear that, at all events, in 1884, when J. E. Bradshaw conveyed part of the property to J. C. Bradshaw in the belief that the mortgage had been paid off, W. Bradshaw ceased to be the agent of the mortgagor, and in 1887 the mortgagor died, from which time the twelve years would certainly begin to run. No doubt interest continued to be paid, but the payments were made by the firm of which Harrison, who was one of the mortgagor's executors, was a partner. Those payments cannot, however, be treated as payments by Harrison in his character of executor, and there is no mention of those payments in the executorship accounts, and unless the payments were made by Harrison in the character of executor they will not operate as an acknowledgment: *Astbury* v. *Astbury* (7); *Brown* v. *Gordon.* (8) The true view is that in 1884 Harrison had represented to the father that the mortgage had been paid off in order to induce him to execute the deed of conveyance to his son J. C. Bradshaw. Nor is there any evidence from which it can be inferred that these payments were made by William Bradshaw in his character of executor.

(1) (1856) 2 Jur. (N.S.) 716.
(2) 11 H. L. C. 115, 133, 138-9.
(3) 19 Ch. D. 539.
(4) [1898] 2 Ch. 111.
(5) 11 App. Cas. 639, 644-6.
(6) [1900] 1 Ch. 774, 779, 780.
(7) [1898] 2 Ch. 118.
(8) (1852) 16 Beav. 302, 308.

In 1892 the principal sum was paid by him to Harrison, but it was not in fact paid by Harrison to the Cust trustees, although it was so entered in the account. The Cust trustees have not established as against the plaintiff any payment of principal or interest so as to take the case out of the statute. The plaintiff has been in possession since 1884 or since 1887, and no acknowledgment of the mortgage debt has been given since those dates. From that time the father had no interest in the Fair Oaks estate, and any payment by him would not take the case out of the statute.

[COZENS-HARDY L.J. Is not *Chinnery* v. *Evans* (1) against you on that point?]

That case is distinguishable, because at the time of the payments in that case the mortgagor was entitled to redeem, and here he was not. *Newbould* v. *Smith* (2) is in point.

[STIRLING L.J. The part of the judgment on which you rely was questioned by the House of Lords. They abstained from expressing their opinion upon the point one way or the other.]

Astbury, K.C., and *Bryan Farrer*, for the Cust trustees. In *Newbould* v. *Smith* (2) the conveyance to the purchaser was made subject to incumbrances, and therefore the purchaser was the person liable to pay the mortgage debt. Here the property was conveyed free from incumbrances, and therefore the vendor was liable to pay the mortgage debt, because he was liable on his covenant to indemnify the purchaser. This case comes within the principle laid down in *Doe* v. *Eyre* (3) and *Ludbrook* v. *Ludbrook* (4), namely, that a person who can claim adverse possession as against a mortgagor cannot oust the mortgagee if within the statutory period the mortgagor has paid interest.

The onus is on the appellants to shew that there was not a sufficient payment of interest to prevent the statute from running. It is admitted that Harrison's firm were throughout solicitors for J. E. Bradshaw, and afterwards for his executors, and also for W. Bradshaw. The Cust trustees could not have refused to accept the interest from those solicitors. If

(1) 11 H. L. C. 115.
(2) 33 Ch. D. 127.
(3) (1851) 17 Q. B. 366.
(4) [1901] 2 K. B. 96.

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the solicitors' books are excluded, the case of the appellants is hopeless. W. Bradshaw was the person who was bound to pay the interest, and his position was not altered in this respect by his becoming executor to his father. The payment of the interest by the solicitor who acted for the mortgagor and for W. Bradshaw is enough. The appellants must prove that the solicitor was not entitled to make the payments, and this they cannot do without his books.

But, if the books are admitted, it is submitted that they shew clearly that the money was borrowed for W. Bradshaw. They shew that Harrison took instructions for the mortgage from W. Bradshaw, and that he paid Harrison's costs in relation to it. The solicitors' accounts shew that down to 1885 W. Bradshaw was debited with the interest as paid by him to his father; after that he was debited with it as paid direct to the Cust trustees. W. Bradshaw was the person who was legally bound to pay the interest, and the payment by him up to 1892 is sufficient to keep alive the mortgage and prevent the statute from running.

[COLLINS M.R. Is not the mortgagee bound to shew that the payment was an acknowledgment by the mortgagor of the continued existence of the mortgage? If the mortgagor thought that the mortgage had been paid off, could the payment of interest by his son operate as an admission by him that the mortgage was subsisting?]

The admission does not depend on the intention of the mortgagor; it is enough that the payment is made by a person who is legally bound to pay for him. The agent who pays need not be known to the mortgagor; it is sufficient if he is legally agent for the mortgagor. In *Chinnery* v. *Evans* (1) it is quite consistent with the facts that the mortgagor never gave the receiver authority to make the payments. In *Harlock* v. *Ashberry* (2) Brett L.J. drew a distinction between an agent who is entitled to pay and one who is under an obligation to pay. If it is said that the payments of interest made by W. Bradshaw since 1887 were not made in the character of executor to his father, the answer is that he was as much

(1) 11 H. L. C. 115. (2) 19 Ch. D. 539, 548.

bound to his father's estate to pay the interest as he was to his father. And indeed the father, as vendor, having sold the estate free from incumbrances, was bound to the purchaser to pay the mortgage debt and to pay the interest until the debt was paid, and the father's estate was equally bound. During the whole of the period in which the plaintiff has been in possession of the estate there has been a person who was bound in law to make the payments of interest. The plaintiff could have called on his father's executors to pay the interest, and could have compelled them to do so.

The plaintiff will not be injured, for assets of J. E. Bradshaw are admitted.

H. Terrell, K.C., in reply. Apart from the solicitors' books, it cannot be properly inferred that W. Bradshaw was the principal debtor. The mortgage debt and the debt secured by the son's bond were distinct debts and were payable at different times. Suppose the father had a set-off or a counter-claim against the Cust trustees, and he wished to avail himself of it for the purpose of paying the interest on the mortgage, could his son W. Bradshaw, by paying the interest, have deprived him of that right? If the solicitors' books are not admissible, as it is submitted they are not, the Cust trustees have no case.

[STIRLING L.J. Interest has been in fact paid throughout by the solicitor of the persons—first the mortgagor, and afterwards his executors—who were liable to pay it. Must not that be treated as payment by those persons?]

A solicitor as such has no authority to admit a liability on behalf of his client.

If the solicitors' books are admissible, all the entries in them must be admitted. If some of the entries are bogus or fraudulent, as is clearly the case here, the credibility of the books is destroyed. The books must be taken in toto or rejected in toto. The fair inference is that Harrison was manipulating the accounts.

In 1884 the father must have believed that the Cust mortgage had been paid off, and the true inference is that he thenceforth ceased to authorize his son to admit on his behalf the subsistence of the mortgage.

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The fact that J. E. Bradshaw became bound to the plaintiff to pay the interest can make no difference; he was already liable to the Cust trustees. There is nothing to shew that Harrison and W. Bradshaw intended to pay the interest in the character of executors of J. E. Bradshaw, and there is no presumption that they did so. The payment was continued after the father's death in the same way as before.

[An argument also took place upon the question of the admissibility of the solicitors' books in evidence, their admissibility as against the appellants being objected to. It is considered unnecessary to report this part of the argument, because the Court held that, by reason of what had taken place at the trial, it was not open to the appellants' counsel to take objections to the admissibility of the books.]

COLLINS M.R. This action is brought by Mr. J. C. Bradshaw, who is now the owner of the Fair Oak estate, against the Cust trustees to obtain a declaration that the estate is free from a certain mortgage, if it ever existed. If the mortgage ever did exist, the plaintiff asks for a declaration that it does not now bind the estate.

The Cust trustees assert that the mortgage is still binding on the estate, and they allege that there has been a payment of interest within the period of twelve years before the commencement of the action, which takes it out of the Statute of Limitations, and they counter-claim as against the executor of the mortgagor for payment of the principal sum and interest, and as against the plaintiff for the enforcement of the mortgage by foreclosure or sale.

The mortgagor, Mr. J. E. Bradshaw, the then owner of the estate, was the father of the plaintiff and also of William Bradshaw, who is now the surviving executor of his father. The father in 1879 borrowed from the Cust trustees the sum of 5171*l.* 14*s.* 6*d.* on the security of a mortgage of the estate, and the question of law which arises is whether a payment of interest, which was made within twelve years before action brought, was made under such circumstances as to amount to a

payment by the mortgagor within the meaning of s. 8 of the Real Property Limitation Act, 1874, coupled as regards the claim for foreclosure with the Act 7 Will. 4 and 1 Vict. c. 28.

That question involves an examination of the circumstances under which the mortgage came into existence, and a difficulty arises by reason of the fact that all the parties had the same solicitor, Mr. Cartmell Harrison, of the firm of Birch, Ingram & Harrison, who is now dead.

The question was raised by Mr. Terrell whether certain accounts kept by Mr. Harrison, in his capacity of solicitor, between himself and the parties were admissible in evidence. Those accounts were, an account between himself and the father, J. E. Bradshaw, an account between himself and the son, W. Bradshaw, and there were also the accounts kept with the Cust trustees. There are, however, certain facts which are admitted or proved, quite apart from the accounts kept by the solicitor, and they may be shortly stated thus. There is no doubt that W. Bradshaw was largely indebted at the time when the mortgage was executed, nor that he was desirous of raising a loan of about 5000*l*. Nor is there any doubt that the machinery by which that loan was obtained was that his father raised that sum by mortgaging his Fair Oak estate to the Cust trustees, and handed the money so raised to his son. There is no doubt that the mortgage was effected, or that interest continued to be paid upon it to the mortgagees down to 1892. I need not carry it any further. The interest was paid by Mr. Harrison, who, it is admitted, was the agent or the solicitor acting for the mortgagor, J. E. Bradshaw, down to his death, and who continued to act as solicitor for his executors, of whom he himself was one, after the mortgagor's death. Those facts are admitted.

But it is said that, even admitting those facts, there is no evidence of such a payment by the mortgagor as would keep alive his obligation under the Statute of Limitations.

[His Lordship read s. 8 of the Act of 1874 and the Act 7 Will. 4 and 1 Vict. c. 28, and continued:—]

Dealing, first, with the uncontested facts, how does the matter stand? There is a mortgage created, interest is paid

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upon it up to a date within the statutory period of limitation by a person who is admitted to have been the solicitor for the mortgagor and afterwards for his executors, and the payment was admittedly received by the mortgagees as and for a payment under the mortgage. Why then is a mortgagee starting with that primâ facie case not entitled to succeed in maintaining his mortgage?

Admitting that, as against a person who has been in possession, as the plaintiff has been for many years, the onus is upon the mortgagee to shew that his mortgage is still alive, yet when it is proved (and the facts which I have mentioned are uncontested) that there has been a continuous payment of interest by a person, who primâ facie is the proper person to pay it, to persons who have received it as interest under the mortgage, it seems to me that the onus of proof is shifted to the person who says that the mortgage has ceased to exist—that is, in the present case to the plaintiff. The question then would be, Has the plaintiff discharged that onus which has been thrown back upon him, and displaced the effect of these payments by shewing that they were made under such circumstances as not to be payments by the mortgagor within the meaning of s. 8?

If the case rested there, and if Mr. Terrell succeeded in excluding the accounts kept by the solicitor, it seems to me that he would have no answer to the defendants' case, because he elected not to call Mr. W. Bradshaw, the person now living who knows most about this matter. Mr. Terrell deliberately elected not to call him, and, having so elected, he now objects strenuously to the admission of Mr. Harrison's accounts which purport to shew the whole history of the financial dealings between these parties—the father, J. E. Bradshaw, and the son, W. Bradshaw, and the solicitor himself. It seems to me that Mr. Terrell cannot really advance a step in his case without going into those accounts. Therefore, although our decision might be firmly rested on the facts which I have mentioned quite apart from anything in the accounts, yet as Mr. Terrell, though trying to keep them out, has himself relied upon some of the facts which appear in them, I think it

is better on the whole that I should deal with them. This involves a cursory consideration of the question how far they are admissible evidence. In my opinion, Mr. Terrell is not now in a position to contest as a matter of strict law the admissibility of these documents by reason of what took place at the trial.

[His Lordship then referred in some detail to what took place at the trial, and continued:—]

If the question of admissibility had been seriously argued in the Court below on the grounds which Mr. Terrell has urged before us, and if the learned judge had been disposed to adopt his view, it would have been competent to Mr. Astbury there and then to call Mr. W. Bradshaw, the person who knows most about the matter, but who, I have no doubt for very good reasons, thought it desirable not to go into the box. We could not now replace Mr. Astbury's clients in the position in which they stood at the trial, and therefore Mr. Terrell is not now entitled to rely on the technical objections which he has urged as to the admissibility of these documents, though I must say that, after hearing his arguments, I am not disposed to attach very great weight to them. But I think the question is not now open to us, any more than it was open to the learned judge before whom it was not raised, and the advantage of whose opinion upon it we have therefore not got.

There is one document which at all events is outside any of the principles urged by Mr. Terrell, namely, the bill-book kept by Mr. Harrison, which contains this entry: "Received on account costs of loan, 24th November, 1879, 150*l*." That is clearly an entry against interest, and it cannot, I think, be contended that it does not make the book admissible in evidence. And when it is in evidence it really shews the whole transaction out of which this mortgage arose. It shews that the money was raised for William Bradshaw, the son, his father becoming the nominal debtor—the mortgagor—as between himself and the Cust trustees, but as between himself and his son raising the money for the son, the son undertaking the obligation of paying the mortgage debt and the interest upon it.

I need not go through the entries in detail, but that is the fair

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and inevitable inference to be drawn from them. It is admitted that the payment of interest was made throughout by Harrison and was charged by him to W. Bradshaw. If the interest was paid by the person, i.e., William Bradshaw, who had come under the obligation which is evidenced by those entries, how can it be said that it was not a payment by the mortgagor? The payment was made under an obligation imposed by the bargain between the father and son that the son should pay, he being, as between these two persons, the real debtor and his father only a surety, though he was directly and personally responsible to the Cust trustees. Having regard to the nature of the inference drawn from a payment of interest and its effect in keeping the security alive, it is necessary that it should be a payment by the mortgagor—that is, such a payment as leads to the inference that the mortgagor acknowledges the security as still subsisting. That is what is meant by saying that the statute only runs from the time of payment. The Act does not say in terms that the payment must be made by the mortgagor, but it is obviously implied, and the cases have established, that the payment must be one which will operate as an acknowledgment by the mortgagor of the subsistence of the security. After such a payment he cannot be heard to say that at the time when it was made the security did not exist. That acknowledgment results just as much when there is an arrangement between the mortgagor and a third person, either by contract or by a mere mandate, that that person shall make the payment for him. Whether the person who makes the payment does so under an obligation imposed upon him by law as a legal agent without his assent, or whether he is appointed under some arrangement with the mortgagor, so long as he pays with the assent, expressed or implied, of the mortgagor, the payment, as it seems to me, will keep alive the liability of the mortgagor, being in point of law an admission by him of the subsistence of the security. In my opinion, this element is to be found in the present case, if it is inferred as a fact (as I have no hesitation in inferring and as Buckley J. also inferred) that the arrangement at the beginning was that the money should be borrowed for the purposes of the son, and that, as

between him and his father, the son was really the principal debtor, and the father was only a surety for him.

Following out the transaction, the entries in the books shew that the interest continued to be paid by the son to the father's account down to 1885, and from that time it was paid direct to the Cust trustees. The father died in 1887, and thenceforward the two executors, Mr. Harrison and William Bradshaw, continued, up to 1892 at all events, to pay the interest in the same way as before.

It was strenuously contended by Mr. Terrell for more than one reason that that was not a payment by the mortgagor within the meaning of s. 8. His first point was that in the accounts to which I am referring (which I think are evidence rather for the benefit of the plaintiff than for that of the defendants) there is in 1884 a transaction indicated which would seem to shew that the mortgage was in fact paid off, and that, though interest continued to be paid in the same way by William Bradshaw, and it is admitted that the mortgage was not really paid off, still this entry indicates some arrangement between the father and Harrison, whereby the father understood that the mortgage either had been paid off or was about to be paid off, so that he was justified in thinking that he could (as he certainly did) convey part of the mortgaged estate to the plaintiff as free from incumbrances. Though that entry no doubt creates a difficulty, it is, I think, only a primâ facie difficulty, and though these entries are admissible in evidence, they must, like any other evidence, be taken only for what they are worth. They do not become absolutely unimpeachable because they are admitted in evidence; and when we know, as we now do, that Harrison terminated his career abruptly by suicide, and that for some period before his death he had obviously been falsifying his books, we must look with suspicion at the entries. When they accord with the facts they would be confirmed aliunde, but when they are inconsistent with other facts which cannot be disputed, we must infer that we cannot rely upon them. Mr. Terrell contended that, if we accept these accounts at all, we are bound to accept them absolutely and without qualification for all purposes. I cannot

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agree to that. They are only evidence, and they must be weighed, as all evidence is weighed, according to the probabilities and the admitted facts, and when they do not agree, or when some particular entry does not agree, with those facts, they or it must be rejected. Now, this particular entry does not accord with the facts, because on the very date at which it is suggested that this mortgage was paid off, we find that William Bradshaw gave his father a bond for an amount which comprised this very sum, namely, 5171*l.* 14*s.* 6*d.*, plus 10,000*l.*, a fresh loan. That is absolutely inconsistent with the notion that William Bradshaw supposed the mortgage to have been paid off. And, as I have said, the interest continued to be paid in the same way down to 1892. Therefore, it seems to me, that piece of evidence is displaced. Very probably some suggestion of the kind was made, and it is even possible that J. E. Bradshaw, the father, believed the mortgage was going to be paid off, at all events that he was justified in conveying the property to the plaintiff on the footing that the mortgage would be paid off. But, when he conveyed the estate as free from incumbrances, he did not deny the existence of the incumbrance. He simply, as between himself and the purchaser, retained the obligation to discharge the mortgage. Though he may have supposed the mortgage was going to be paid off, so as to justify him in making the conveyance free from incumbrances, that does not carry the paper entry beyond this, that it is an entry which does not accord with the fact.

Then Mr. Terrell said that the payment of interest by William Bradshaw can be relied on as taking the case out of the statute, only on the footing that it was made with the assent of the mortgagor, and, if the mortgagor was under the impression that the mortgage was paid off, that at any rate gets rid of any implied assent by him, or any admission on his part that the security was still subsisting. He regarded it as at an end, and you cannot from the fact that William Bradshaw paid the interest infer that the father assented to the security being thereby kept alive. But in my opinion that argument cannot be maintained, having regard to the original arrangement for the loan. William Bradshaw came under a liability

to his father to pay the principal of the mortgage debt, and to pay the interest upon it as long as it subsisted. That his obligation continued so long as the mortgage subsisted, whether the father thought it subsisted or not, and the payment by the son in these circumstances under the contract with his father would, as it seems to me, by virtue of that contract enure as a payment in relief of the mortgagor on the still subsisting contract, and must be taken to have been made with his assent and by his authority under the contract. That contract would survive, although the mortgagor himself were dead. Therefore it would be possible for, and it was indeed still obligatory upon, William Bradshaw, as between himself and his father's estate after the death of his father, to keep alive the mortgage by paying the interest, as he did, notwithstanding that his father might for some time have been under the impression that the mortgage had been paid off. I think, therefore, there was a payment which had all the essentials to render it an admission by the mortgagor that the mortgage was still subsisting.

Then Mr. Terrell took another point. He said that although after the death of his father William Bradshaw was his executor, he still retained the character which he had before, namely, that of the person for whom the money was really borrowed, and a payment made by him can have no more force or effect than if he had not been executor. No doubt after the father's death the position was changed to this extent, that the father was not there to be personally and ostensibly bound by and taken as making the admission involved in a payment of the interest from time to time by his son; but his executors, of whom one was the son and the other was Harrison, would be just as much bound as the father would have been, if he had been alive. They could make the admission and could make the payment, and if they were bound by their testator's contract as his representatives, a fortiori they were bound to assent to whatever was done by the other party to it in carrying it out.

A difficulty arises from the fact that William Bradshaw, the other party to the contract, was himself an executor; but I think it was perfectly competent for William Bradshaw and Harrison as executors to stand in the shoes of the testator,

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and approve of that which was done by one of them—by William Bradshaw, the debtor—in implementing the bargain for the original loan.

Therefore, I think that the payment by William Bradshaw when he was executor stands on exactly the same footing as the payment made by him before his father died, and has exactly the same consequences, and that it was a good payment to take the case out of the statute.

I do not think it is necessary to deal with any of the cases which have been discussed, because, on the broad principle which I have stated, this bargain clearly brings the payments by Harrison within the limits which the authorities have imposed upon the right to treat a payment made by a third person as a payment made by a mortgagor. The latest case in the Privy Council, *Lewin* v. *Wilson* (1), clearly covers the position which I find as a fact to have been that of this father and son in relation to the mortgage.

For these reasons I think that Buckley J., who delivered a most admirable judgment, in which he discussed all the authorities, was absolutely right, and, were it not for the vigorous and interesting argument which has been addressed to us by Mr. Terrell, I should have thought it sufficient to say that I entirely agree with the conclusion of Buckley J. as well as with his reasons. In my opinion, the appeal should be dismissed.

STIRLING L.J. I am of the same opinion, and I do not wish to add anything to what the Master of the Rolls has said.

COZENS-HARDY L.J. I am of the same opinion, and I desire to add only a few words. The real point seems to me to be, what was the actual arrangement made about the loan. Buckley J. has arrived at the conclusion that the father borrowed the money for William, the son, and that, as between the father and the son, the latter was the person liable to pay the interest. Apart from anything else, it seems to me that the bill of costs to which the Master of the Rolls has alluded

(1) 11 App. Cas. 639.

contains abundant evidence of this. It is a bill which was paid by the son. I find in it these entries: "Instructions for bond from you to your father to secure the amount"; and again: "Attended you on your calling, when you executed bond to your father for the amount raised by him on mortgage." Putting together these facts—that the mortgage was for a peculiar sum, that the son's bond of the same date was also for precisely the same sum, that the rate of interest was the same, and that there are these entries in the bill of costs—quite apart from other disputed documents—I think it is abundantly clear that, as between the father and the son, the son was bound to indemnify the father against the mortgage obligations. That being so, although there was no contract between the mortgagees and the son, it is in my view quite sufficient that there was a contract between the mortgagor and the son, which, as between them, bound and entitled the son to make the payments of interest to the mortgagees, and, that being so, there has been a payment of interest which suffices to prevent the statute from running. Any other conclusion than that of Buckley J. would, I think, have placed mortgagees in a position of extreme danger. Mortgagees advance money on a mortgage; interest is for a very long period paid regularly to them by, and is received by them as and for interest from, a solicitor who is admitted to have been the solicitor for the mortgagor and for his executors after his death. It seems to me that under those circumstances the mortgagees are not bound to inquire into the precise relations between the solicitor and his clients, but are entitled to assume that the solicitor is doing that which is in the ordinary course of his business as solicitor under the circumstances, namely, paying for his clients the interest due on the mortgage which those clients are liable to pay.

For these reasons I think that the appeal must fail and be dismissed with costs.

Solicitors: *Hunter & Haynes; Nicholl, Manisty & Co.*

W. L. C.

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1901
FARWELL J.
July 2, 3, 4, 5, 11.
C. A.
1902
June 10, 11.

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[1901 C. 192.]

Company—Prospectus—Omission of Material Contract—Waiver Clause—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A waiver clause in a prospectus as to the disclosure of contracts under s. 38 of the Companies Act, 1867, may be enforced against an intending shareholder, if it is honest and not misleading, but not if it fails to give sufficient notice as to the nature of what is to be waived.

The prospectus of a mining company disclosed (inter alia) an agreement as to the purchase of the produce of the mine, and stated that the directors had guaranteed the subscription of a part of the capital, and would receive a commission for so doing. It then stated that there might also be various trade contracts and business arrangements in addition to the before-mentioned agreement as to the purchase of the produce, and that as these contracts and business arrangements and the above-mentioned underwriting agreements might constitute contracts within s. 38 of the Companies Act, 1867, applicants for shares should be deemed to waive the insertion of the particulars of any such contracts, arrangements, or agreements. The prospectus did not disclose a contract between the promoters and K., the future chairman of the company, whereby a firm of which K. was a member was to receive 12,000 fully paid 1*l.* vendor's shares, as to 2000 for commission for underwriting, and as to 10,000 for the use of the names of K. and the firm on the prospectus, and for adopting the company :—

Held, by Farwell J. and by the Court of Appeal, (1.) that this was a contract which ought under s. 38 to have been disclosed; (2.) that it was not covered by the waiver clause.

Per Romer L.J.: Apart from s. 38, the contract ought in fairness to intending investors to have been disclosed in the prospectus.

The Panuco Copper Company, Limited, was incorporated on May 24, 1899, with a capital of 500,000*l.* divided into shares of 1*l.* each, with the object of acquiring the Panuco Copper Mine, situate at Monclova, in Mexico. The defendant Keswick, who was a partner in the well-known firm of Matheson & Co., merchants, was chairman of the board of directors of the company from the date of its incorporation. The defendant Carlton, who was a member of a firm of metal merchants, Messrs. Saunders, Fielding & Carlton, and the defendant Wheater, a stockbroker of Newcastle, were promoters of the company, and Carlton was also a director.

The history of the formation of the company was shortly as follows:—

In January, 1899, Carlton had obtained an option to buy the Panuco Mine from an American company called the Panuco Copper Mining Company, and he and Wheater determined to combine to promote and form a company to purchase the mine from Carlton at a profit, and, with a view to ensuring success in their appeal to the public to take shares, they desired to associate Keswick and the firm of Matheson & Co. with their adventure. To this end negotiations took place in February, 1899, but they came to an end on February 24. They were, however, renewed on March 10, when Wheater, on behalf of himself and Carlton, had an interview with Keswick, and entered into an arrangement with him which he reported to Carlton. Carlton embodied this arrangement in a letter written by him in the name of his firm, and sent to Matheson & Co. This letter was as follows:—

"Messrs. Matheson & Co.,

"3, Lombard Street. 10th March, 1899.

"*Re* Panuco Company.

"Dear Sirs,—We beg to confirm the following arrangement made with you to-day, namely, that, in consideration of your underwriting 10,000 shares in the above company about to be formed, you are to receive 12,000 vendor shares as commission therefor. You are also to be appointed commercial agents for the company, and the registered offices are to be located at your address.

"It is further agreed that your Mr. Keswick will go on the prospectus as chairman of the company.

"Yours faithfully,

"Saunders, Fielding & Carlton."

In pursuance of this contract Matheson & Co. underwrote the 10,000 shares; they were appointed commercial agents of the company; the company's offices were located at their address; and Keswick went on the prospectus as chairman of the company. The 12,000 shares were received by Keswick and one Macdonald, another member of the firm of Matheson & Co.

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On May 24, 1899, the defendants issued a prospectus dated May 27, 1899, inviting subscriptions for 333,334 shares in the company (being the balance of the capital after allotting 166,666 fully paid-up shares to Carlton as part payment for the purchase of the mine). In this prospectus Keswick and Carlton were named as directors and Keswick was named as chairman, and the firm of Matheson & Co. were named as commercial agents. The prospectus stated that the company undertook to comply with the provisions of an agreement dated January 3, 1898, entered into by the Panuco Copper Mining Company (the American company) with the Great Mexican Central Smelter, under which the latter was under liability to take the produce of the mine up to 1000 tons per month, and had power to take the whole produce thereof at current prices fixed by reference to the said agreement until December 31, 1899. The prospectus then set forth the objects of the company and extracts from reports of various experts shewing the probability of successful working of the mine and the prospect of large profits, and it proceeded as follows:—

"The directors with other underwriters have guaranteed the subscription of part of the company's capital, and will receive a commission from the vendor for so doing. The following contracts have been or will be entered into. An agreement dated February 8, 1899, and made between the Panuco Copper Mining Company of the one part and Samuel Watkin Carlton of the other part, under which the vendor agreed to purchase the mine and other property to be acquired by this company. An agreement, also dated February 8, 1899, and made between the same parties as the last-mentioned agreement, extending the time fixed for the completion thereof. An agreement dated March 10, 1899, and made between the said Samuel Watkin Carlton of the one part and the said Edmund Cook Wheater of the other part, providing for the division of the profits of the resale to this company. An agreement between the said Samuel Watkin Carlton of the one part and this company of the other part, providing for the resale to this company at a profit. There may also be various trade contracts and business arrangements in addition to the before-mentioned

agreement of January 3, 1898. As these contracts and arrangements and the above-mentioned underwriting agreements may constitute contracts within the meaning of the 38th section of the Companies Act, 1867, applicants for shares shall be deemed to waive the insertion of the dates of and names of the parties to any such contracts, arrangements, or agreements, and shall accept the foregoing as a sufficient compliance with s. 38 of the Companies Act, 1867, or otherwise."

The prospectus contained no disclosure of the contract of March 10, 1899, between Saunders, Fielding & Carlton and Matheson & Co.

The form of application for shares, after stating that the applicant agreed to accept the same subject to the memorandum and articles of association, and upon the terms of the prospectus, concluded as follows: "and I agree with the company as trustee for the directors and other persons liable to waive any further compliance with the 38th section of the Companies Act, 1867, than that contained in such prospectus."

On May 26, 1899, the plaintiff applied for 500 shares in this company. The plaintiff, as he alleged and as the Court held, took these shares upon the faith of the prospectus, and would not have applied for the shares if he had known of the contract of March 10, 1899.

The mine proved to be of little value, and on April 4, 1900, an order was made for the compulsory winding-up of the company.

On January 15, 1901, the plaintiff commenced this action against the defendants under s. 38 of the Companies Act, 1867, for a declaration that the prospectus must be deemed fraudulent on the part of the defendants in that it did not disclose the contract of March 10, 1899, and for damages in respect of such non-disclosure.

At the trial it was conceded that the letter of March 10, 1899, did not correctly express the arrangement between the parties, and that 2000 only of the 12,000 shares were to be allotted as the commission for underwriting. As to the balance of 10,000 shares, there was a dispute of fact whether they were the price paid for the use of the names of Matheson &

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Co. and Keswick on the prospectus, as the plaintiff alleged, or, as the defendants alleged, for acting as commercial agents for the company.

Upon this point the defendant Keswick, in his examination before the registrar in the winding-up of the company, deposed that the services for which his firm were to be paid the 10,000*l.* were to examine the prospectus; to satisfy themselves that it was an undertaking to which they could honestly attach their names; and to locate and take charge of the business; and in the course of his examination at the trial of the action he said: "I considered that taking the commercial agency in the way that it was discussed with Mr. Wheater was that Matheson & Co. were adopting the Panuco Company—that they were to take it into their office, that they were to have the responsibility over a considerable period without remuneration in the form of a commission, and that it would take a great deal of attention to construct a railway to develop the mines, to undertake the selection of the right people to investigate fully the property, to survey the country for the railway, and to do many things before it would be possible that the mine would give results. In consideration of such requirements as I deemed them, on the part of whoever assumed the management and the control, I said that it would be absolutely necessary if I went on the board, and Matheson & Co. were the commercial agents, that the company should be located in our office, as it would require daily, if not hourly, attention."

The evidence of the other defendants as to the effect of this contract was substantially to the same effect.

It appeared that Matheson & Co. were to be separately remunerated for acting as commercial agents of the company, and were to receive 1500*l.* a year for locating the company in their offices and providing a clerical staff.

It further appeared that the prospectus was settled by counsel on behalf of the defendants, and his opinion taken as to whether it fulfilled all legal requirements before the contract of March 10, 1899, was entered into, and that subsequently, on being shewn the letter of March 10, he altered the defendants' prospectus by inserting in the waiver clause the provision

relating to the underwriting contracts, although he saw no reason to alter his opinion, as he thought that this contract would be covered by the waiver clause as altered. Counsel, however, was not informed of the interview at which the arrangement which was embodied in the letter was come to.

The action came on for hearing before Farwell J. on July 2, 1901.

Swinfen Eady, K.C., Upjohn, K.C., and *Martelli*, for the plaintiff. The letter of March 10 was a material contract, and the defendants are liable under s. 38 of the Act for its omission from the prospectus of the company: *Sullivan* v. *Mitcalfe*. (1) This contract is not an underwriting agreement or business arrangement, and is not covered by the general terms of the waiver clause. Further, the clause is misleading in two respects: first, because the reference to the contract of January 3, 1898, points to other contracts of a similar character; secondly, because the use of the words "there may be" leads to the inference that the defendants were not aware of any other contracts within the section: *Greenwood* v. *Leather Shod Wheel Co.* (2) There is no suggestion of personal dishonesty against the defendants, but under the section they are liable for the non-disclosure of the letter.

Rufus Isaacs, K.C., and *Muir Mackenzie*, for the defendant Keswick. The letter is not a material contract within the meaning of s. 38, and if the names and date to it had been mentioned in the prospectus they would not have affected the mind of an applicant for shares. Next, the letter on the face of it is an underwriting agreement or business agreement, and is within the waiver clause. In *Greenwood* v. *Leather Shod Wheel Co.* (2) the waiver clause was dishonest, and the Court of Appeal said they would have dealt differently with an honest clause. There is no charge of dishonesty here, and the waiver clause is not a tricky clause. It was in the prospectus before the letter was written, and the subsequent omission of the letter was not intentional, but was due to an honest mistake.

As to the measure of damages, it does not follow that, because

(1) (1880) 5 C. P. D. 455. (2) [1900] 1 Ch. 421.

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the section says the prospectus is to be deemed fraudulent, therefore the plaintiff has suffered in consequence damages to the extent of the nominal value of the shares. He must prove that he has: *Twycross* v. *Grant.* (1)

Neville, K.C., and *D. Jones*, for the defendant Carlton, and *Younger, K.C.*, and *Pattullo*, for the defendant Wheater, adopted the foregoing argument.

Swinfen Eady, K.C., in reply, on the question of fraud, cited *Jennings* v. *Broughton* (2); and, on the effect of a general waiver or release, referred to *Thomson* v. *Eastwood* (3); Elphinstone on Interpretation of Deeds, p. 137; *Ramsden* v. *Hylton* (4); *London and South Western Ry. Co.* v. *Blackmore.* (5)

[Upon the question whether the plaintiff subscribed for the shares upon the faith of the prospectus, *Arnison* v. *Smith* (6) and *Smith* v. *Chadwick* (7) were referred to.]

Cur. adv. vult.

1901. July 11. FARWELL J., after stating the facts relating to the promotion of the company and reading the letter of March 10, 1899, continued as follows:—No one now contends that this letter expresses the real bargain with precise accuracy. It is common ground that the whole 12,000 shares were not the commission for underwriting 10,000 shares; 2000 only were attributable to this commission, and the balance of 10,000 is said by the plaintiff to be for the use of the names of Mathesons and Keswick on the prospectus, and is said by the defendants to be remuneration for acting as commercial agents of the company. This contract was not disclosed in the prospectus. Now, I desire to state clearly that I find no ground whatever for imputing to any of the defendants any fraudulent intention of, or any scheme for, fraudulently concealing this contract. I think that its omission arose from an unfortunate misunderstanding between counsel and solicitor, due to some extent to the fact that the contract on the face of it appeared to be an

(1) (1877) 2 C. P. D. 469.
(2) (1854) 5 D. M. & G. 126.
(3) (1877) 2 App. Cas. 215.
(4) (1751) 2 Ves. Sen. 304, 310.
(5) (1870) L. R. 4 H. L. 610, 623.
(6) (1889) 40 Ch. D. 567.
(7) (1884) 9 App. Cas. 187.

underwriting contract only; but this is not sufficient to relieve the defendants from liability under the Act. The statute provides that the omission, with knowledge of their existence, of material contracts shall be deemed to be fraudulent; that is to say, it creates a new cause of action, and imposes the civil penalties of actual fraud on omissions which are not actually fraudulent: *Twycross* v. *Grant*. (1) At common law the plaintiff in an action for deceit has to prove actual fraud: *Derry* v. *Peek*. (2) At common law mere non-disclosure of facts, however morally blamable, will not support an action for deceit: *Peek* v. *Gurney* (3), per Lord Cairns; but the Act not only makes non-disclosure a cause of action, but makes it a cause of action based on fraud not proved to exist, but deemed to exist as a statutory fiction for the purpose of supporting the action.

The first question is: Did the plaintiff subscribe on the faith that there was no such contract as that of March 10 in existence because it was not stated in the prospectus? I apprehend that in this respect the same principles must apply to the omission of a material fact as apply to the insertion of an untruth in a prospectus. In the case of a positive statement the plaintiff's allegation is that such untruth was the inducing cause of his entering into the contract. It is perhaps not accurate to say that an omission is an inducing cause. The prospectus is in each case the inducing cause—in the one case because it does, and in the other because it does not, contain something: so that in the case of a misstatement the plaintiff's allegation is that if he had not been told, and in the case of an omission that if he had been told, so and so he would not have subscribed. Now, it cannot be enough for a man to swear that he would not have entered into the contract if he had known something that was concealed from him. It is easy to be wise after the event, and many men can honestly persuade themselves when a company has failed that they would have been influenced by a circumstance which in all probability would have made no impression whatever on their

(1) 2 C. P. D. 469. (2) (1889) 14 App. Cas. 337.
(3) (1873) L. R. 6 H. L. 377, 403.

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mind when considering an investment or speculation. The test must be, Is the omission material? And if the Court sees that the fact omitted is of such a nature that it might reasonably deter, or tend to deter, the ordinary investor from entering into the contract, this is sufficient. It is in great measure an inference of fact to be drawn by the Court or a jury from the circumstances of the case. If a material fact is omitted from a statement put forward to induce a person to enter into a contract, and he does enter into the contract on the faith of that statement, it is a fair inference that he would not have contracted if he had known of the fact, and that in this sense the omission induced the contract. As Lord Blackburn points out in *Smith* v. *Chadwick* (1), the plaintiff could not be called as a witness in his own behalf in the days when *Pasley* v. *Freeman* (2) was decided, and he must have succeeded, therefore, on the inference drawn from the circumstances of the case. It would no doubt be matter of comment if a plaintiff was not called nowadays to swear that the fact omitted would have deterred him from contracting; but neither his testimony nor his absence is conclusive. This is perhaps only another way of stating that the generality of the terms of s. 38 must be limited as pointed out by Thesiger L.J. in *Sullivan* v. *Mitcalfe* (3), where he says: "Every contract relating to the formation of a company, or to its capital, property, or business when formed, or to the position, pecuniary or otherwise, in regard to the company, or its promoters or vendors, of the directors or other officers of the company, and which is material to be made known to persons invited to take shares in order to enable them to form a judgment as to the policy of so doing, is a contract within the meaning of s. 38 of the Companies Act, 1867, and as such must be disclosed under the circumstances and to the extent which the section points out, provided that one of the parties to it is at its date or subsequently becomes a promoter, director, or trustee of the company."

Now, in order to answer the question whether this contract

(1) 9 App. Cas. 196. (2) (1789) 3 T. R. 51; 1 R. R. 634.
(3) 5 C. P. D. 461.

is material or not, I have to determine what it really is. I am unable to accept the defendants' suggestion that it is a contract to act as commercial agents for the company in consideration of a payment of 10,000 shares. There was no company in existence which could so contract, or which could ratify such a contract; no period or terms of agency are mentioned. If Mathesons had refused to act the company could have recovered nothing against them, and the measure of damages in an action by Carlton would have been on a totally different basis, and Carlton would have recovered for himself and not for the company. Further, the evidence does not support any such contract. [His Lordship then dealt with the evidence of the defendants Keswick, Carlton, and Wheater at length, and continued:—]

I find as a fact that the consideration for the 10,000 shares was the agreement by Mathesons to take the company into their office, not merely to lend their names to it, for this might imply that they simply sold their names without more, and this would be unjust to them. It was to induce them "to qualify" (as an expert witness would say). I give them credit for intending to satisfy themselves that the matter was sound before they allowed their names to be used; but the consideration was for taking the steps necessary to satisfy themselves, and allowing their names to be used if and when they were satisfied. The commercial agency was a part of the consideration moving to, not from, Mathesons. It was likely to be valuable to them. Carlton had tried to get Mathesons to give him 5000 shares for giving up his claim in it in their favour. If the 10,000 shares had really been part payment for acting as commercial agents, it ought to have been disclosed to the directors at the first meeting, when Mathesons were appointed agents on terms to be arranged, but it was not mentioned. It is not suggested that the other matters mentioned in the letter of March 10, namely, the provision of offices and the chairmanship, were in any way paid for by these shares. All these three matters were in fact dealt with as separate matters to be contracted and paid for by the company, and the contract of March 10 was never mentioned to any member of the board.

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The existence of such a contract is, in my opinion, material for the consideration of an intending investor. He subscribes on the faith of Mathesons' name and on the well-founded assumption that they have looked into the matter, and are so well satisfied with the venture as to take it under their protection. How can it be said that it cannot affect his judgment to know that Mathesons do not take the matter up simply on its merits, but because they have been paid to do so by the vendor, and that such payment (being in shares of the company) was necessarily dependent on the successful flotation of the company, and that such payment was made by the vendor out of his vendor's shares, so that the burden was in effect borne by the company itself? I cannot bring myself to doubt that the "careful man, disposed to invest in an undertaking," spoken of by Cockburn C.J. in *Twycross* v. *Grant* (1), would think the difference very material between the support of Messrs. Matheson to a company on the ground of the merits of the company alone, and such support on the ground of payment dependent on the existence of merits sufficient to induce the public to subscribe. If I employ an agent to advise me on the value of an estate that I think of purchasing, I should certainly consider it material to know that he was to be paid by the vendor for inspecting the estate a fee dependent on my purchasing.

The next question arises on the waiver clause in the prospectus. I hold that all the defendants approved and authorized the issue of the prospectus, dated May 27, on May 24, and that the plaintiff subscribed on the faith of this prospectus. [His Lordship read the waiver clause, and he continued as follows:—]

Now, as a matter of construction, is the agreement of March 10 a trade contract or business arrangement within the meaning of this clause? In my opinion it is not. The company were taking over as a going concern an open mine which was being worked in Mexico. One contract relating to taking the produce of the mine was mentioned in the prospectus. It is obvious that there might be many similar to it, of which the

(1) 2 C. P. D. 469, 528.

directors could not be expected to know. The collocation of the words shews that the draftsman was referring to contracts and arrangements similar to that specified. I have heard the evidence of counsel and solicitor as to the settlement of the prospectus, and assuming that counsel (who loyally took the burden on himself) is accurate in his recollection, and did really say that it was not necessary to mention this contract in the prospectus, it must (as his own contemporaneous opinion shews) have been on the ground that it was an underwriting contract, not that it was a trade or business arrangement. It was, I think, overlooked in the argument that counsel had the written document—which purports to give 12,000 shares for underwriting 10,000—before him, and not the oral evidence which shews the true nature of the agreement; and he had himself written in an express reference to underwriting contracts. Further, I do not think that it lies in the mouth of the defendants consistently with honesty to say that they knew of and intended the contract of March 10 to fall under the head of trade contracts and business arrangements when they stated, not that "there are," but that there "may be," such contracts.

In the view that I take of the construction of the clause, it is hardly necessary for me to consider the other point argued; but, as it has been argued, I desire to say that I agree with Romer L.J.'s statement in *Greenwood* v. *Leather Shod Wheel Co.* (1), where he says, during the course of the argument: "Assume that there was a contract by the plaintiff not to take advantage of the Act, how can you bind him when you state in your prospectus that there 'may be' other agreements when you knew there were? In your case you are a promoter knowing of this contract, and yet you put in a misleading statement that there 'may be' other agreements. That, surely, is not a case in which you can say there is a waiver." A man who desires to take advantage of a waiver clause must state the facts fairly. If he states that there may be contracts, he intends it to be inferred that he knows of none. It is immaterial whether he intended to deceive or not when he

(1) [1900] 1 Ch. 421, 431.

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made the statement; but if the element of unfairness is requisite, it is found when he insists that its effect is to make the other contracting party give up something of the existence of which the asserter knew, and the other contracting party was ignorant. As I read the judgments in *Greenwood* v. *Leather Shod Wheel Co.* (1), the decision, and the reasons given for it, involve the proposition that the statutory rights under the 38th section can be waived; that any waiver obtained by unfair dealing or trickery is void; that the person said to have waived must have sufficient information of what he was waiving; and that, apart from fraud, the same principles apply to waiver clauses as are applicable to ambiguous or misleading statements in conditions of sale or releases.

I should add that the question of damages which Mr. Isaacs argued last as a separate point is really the same as the question of materiality, which I have already disposed of. As Lord Blackburn says in *Smith* v. *Chadwick* (2): "Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none." The measure of damages I hold to be the difference between the amount paid by the plaintiff for his shares and the actual value of the shares on the day after they were allotted to the plaintiff. In the present case I must depart from the usual rule to which Bowen L.J., when sitting in the Court of Appeal, said that the Chancery Division ought to adhere, and on which I have always acted, namely, that it is as necessary (in the absence of a prior order of the Court or agreement between the parties) for the plaintiff to prove the amount of damages that he has suffered as it is to prove every other part of his case; and I direct an inquiry as to what was the real value of the shares on the day after they were allotted to the plaintiff, and I refer to the judgments of the Lords

(1) [1900] 1 Ch. 421. (2) 9 App. Cas. 195.

Justices in *Peek* v. *Derry* (1) as shewing the basis on which the inquiry is to proceed. C. A. 1902

There will be a declaration of the defendants' liability; and the defendants must pay the costs of the action. CACKETT v. KESWICK.

H. L. F.

The defendant Keswick appealed. The appeal came on for hearing on June 10, 1902. C. A.

Rufus Isaacs, K.C., and *Muir Mackenzie*, for the appellant. There is no suggestion of actual fraud or bad faith on the part of the appellant; the judgment is founded simply upon s. 38. The questions are: (1.) Was the contract one which it was material should be disclosed by virtue of s. 38? (2.) Is it covered by the waiver clause? It is admitted that the letter of March 10, 1899, did not state the contract accurately. Both sides agree that 2000 shares were to be the commission for underwriting 10,000 shares, but they differ as to the consideration for the other 10,000 shares. The appellant says that it was the remuneration for the work to be done by his firm as commercial agents of the company; the plaintiff says it was the consideration for the appellant's firm allowing their name to appear on the prospectus, and for the use of the appellant's name as director and chairman of the company. The right conclusion from the evidence is that the appellant's version is the true one. Matheson & Co. were bound to act as the commercial agents of the company for a reasonable time, and some time must necessarily elapse before in a company of this nature they would receive any remuneration as agents in the ordinary way.

[ROMER L.J. Suppose they had retired at once upon the registration of the company: could the company have sued them? The contract was with the promoters. The company could not adopt it. In order to bind them there must be a new contract.]

If there was no contract, there was nothing to specify under s. 38. If there was a contract, it was a "trade contract" or a "business arrangement," which it was not necessary to specify.

(1) (1887) 37 Ch. D. 541, 593–4.

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It was not material that an intending investor should know of its existence. The contracts which s. 38 requires to be disclosed are defined by Thesiger L.J. in *Sullivan* v. *Mitcalfe* (1) to be those contracts which are material to be made known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing. Accepting that definition, we say that this contract was not within it. But, further, in every case in which promoters or directors have been held liable under this section it has been in respect of some contract which they had an interest in concealing, as in *Gover's Case* (2) and in *Greenwood* v. *Leather Shod Wheel Co.* (3) This was a contract which Keswick could have no interest in concealing, and both he and the promoters were anxious that no contract which ought to be disclosed should be omitted. Therefore the omission of this contract was not a material omission within the section.

[STIRLING L.J. Suppose there were no question under s. 38, and the full details of this contract had not been disclosed, could Keswick's firm have obtained the remuneration which was stipulated for as against the company?]

That would depend upon whether this Court would regard the concealment as similar to the concealment in *In re Olympia, Limited.* (4) That case proceeded on the ground that the want of disclosure was wilful and fraudulent.

[STIRLING L.J. That cannot be the test. In *Imperial Mercantile Credit Association* v. *Coleman* (5) the House of Lords attributed perfect honesty to Coleman, but held that he failed in his duty to disclose fully a benefit he was getting in his private capacity, being at the same time director of the company.]

The question would depend upon the nature of the contract. Moreover, disclosure to the company and disclosure to an individual shareholder stand on a different footing. Here, as pointed out by James L.J. in *Gover's Case* (6), the statute only creates the statutory fiction of a thing being deemed to be

(1) 5 C. P. D. 455.
(2) (1875) 1 Ch. D. 182.
(3) [1900] 1 Ch. 421.
(4) [1898] 2 Ch. 153; [1900] A. C. 240.
(5) (1873) L. R. 6 H. L. 189.
(6) 1 Ch. D. 188-9.

fraudulent as against a person applying for shares ; it is not to be fraudulent in any other way, and the Lord Justice certainly thought that it was intended that the prospectus should only be deemed to be fraudulent on the part of the person wilfully making the omission.

Then as to the waiver clause, as is pointed out by Lindley M.R. in *Greenwood* v. *Leather Shod Wheel Co.* (1), the difficulties as to what contracts are covered by the section have given rise to honest attempts to protect honest men by waiver clauses from the consequences of honest unintentional breaches of the law ; and when the Court has to deal with an honest case of that kind, it will uphold the contract. An honest waiver clause, one which is not tricky or calculated to deceive, is valid and binding upon those who apply for shares on the faith of the prospectus. There is nothing tricky or calculated to deceive here. If it is necessary to state expressly that which the reader is asked to waive, a waiver clause would not be needed at all.

Upjohn, K.C., and *Martelli*, for the respondent.

VAUGHAN WILLIAMS L.J. I always approach these cases under the 38th section with a strong feeling of repugnance to the duty which I have to perform, because I think that the 38th section, which in effect provides that a man who omits to mention in a prospectus a contract which it would be material to an intending investor to know—I am taking Thesiger L.J.'s limitation of the section—shall although acting honestly be deemed fraudulent, is a section which no judge can give effect to, not only without a feeling of repugnance, but without a feeling that that which he is doing does not really tend to the maintenance of commercial honesty and commercial morality. To herd together, under a collective word like "fraudulent," people who are honest and people who are dishonest, to my mind, cannot possibly tend to the maintenance of commercial morality. We have in this case a statement of the conclusion at which Farwell J. arrived. He says: "I desire to state clearly that I find no ground whatever for imputing to any of

(1) [1900] 1 Ch. 437.

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the defendants any fraudulent intention of, or any scheme for, fraudulently concealing this contract." The question which we have to decide on this appeal is whether or not upon the facts of the case the issue of this prospectus is fraudulent upon the part of these men whose conduct Farwell J. has thus characterised. Having said that, I will now proceed to deal with this case and see how far the facts bring it within this section.

Now I have already said that I do not propose, and I do not think that any judge has ever proposed, to read the 38th section according to the literal construction of the words. If the words of the section were to be construed literally, the section would really be impossible of just application at all, and, therefore, I take Thesiger L.J.'s limitation in *Sullivan* v. *Mitcalfe* (1), and I ask myself whether this contract is a contract which it would be material for a would-be investor to know before he made his investment. I am not quoting the exact words of the Lord Justice, but am giving the effect of them. I cannot doubt myself that this is a contract which it would be material for an investor to know. Even if the contract had been exactly the contract contained in the letter of March 10 I should have come to that conclusion. I mean by that that, if there had been no statement on behalf of Mr. Keswick, Mr. Wheater, and Mr. Carlton as to what the real contract was, I should have said that this letter ought to have been disclosed in the prospectus. [His Lordship read the letter.] I cannot doubt myself but that every would-be investor in this company would think it a matter of importance that he should know before investing that these were the terms of an agreement under which, amongst other things, Mr. Keswick agreed to go on the prospectus as chairman of the company, and the promoters, Saunders, Fielding, and Carlton, agreed that he should be entitled to that position; but when one comes to see upon the face of the letter that he is to underwrite, and to receive in shares 120 per cent. for underwriting, it seems to me still more abundantly clear that it was a letter which it was material for any one to see before determining whether he would take

(1) 5 C. P. D. 455.

shares in this company or not. When one gets to facts outside the letter and finds that Messrs. Matheson were intended to get the ordinary remuneration as commercial agents, quite apart from any remuneration provided for in this agreement, and that they were to receive 1500*l.* a year for locating the new company in their office and providing the necessary clerical staff, I think that it emphasises the materiality of this letter to the decision of a would-be investor.

Now it is said that this letter does not contain the real agreement, and Farwell J. refers to that by saying, after he had heard the whole case: "No one now contends that this letter expresses the real bargain with precise accuracy; it is common ground that the whole 12,000 shares were not the commission for underwriting 10,000 shares: 2000 only were attributable to this commission, and the balance of 10,000 is said by the plaintiff to be for the use of the names of Matheson and Keswick on the prospectus, and it is said by the defendant to be the remuneration for acting as commercial agents of the company." I do not think it makes any real difference on this point whether you take the plaintiff's view or whether you take the defendants' view. It seems to me that, even if you treat it as being remuneration to Messrs. Matheson for acting as commercial agents for this company, it was very material for a would-be investor to know that Messrs. Matheson, a member of whose firm by this very agreement was entitled to become and agreed to become chairman of the company, were to receive this sum of 10,000*l.* in vendor's shares, and I think it right to dwell upon this part of the case, because, speaking for myself, I have a little difficulty—I do not think it is shared by my brethren—in formulating the proposition about this which is said to be the true contract. It has not been suggested here that there was such a mistake as would have entitled the parties to have a rectification of the contract. It is rather put that this was an understanding; but if it was not the contract binding between the parties, the letter of March 10 was in truth and in fact the contract binding between the parties. I have my doubts, not as to whether an oral contract, where there is

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an oral contract and nothing else, comes within the scope of the 38th section, but whether, where you have a contract in such a form that as between the parties it excludes any other term whatsoever, you have to mention in your contract the sort of understanding between the parties, if that understanding was of such a nature that it could not be enforced between them. I daresay there may be some mode of expressing this so as to leave this statement in evidence as to the payment of 10,000*l.* as remuneration for acting as commercial agents a contract or a part of a contract; but I have not myself quite arrived at a conclusion as to how such a proposition would, in the face of the evidence in the present case, have to be stated. I have a difficulty about that; but, taking the view that I do of this letter, it seems to me that there is no need why I should attempt to formulate such a proposition at all. I think that this contract, notwithstanding the fact that this or that passed at the interview, even if it be regarded as the only enforceable contract which was entered into between the parties, is a contract which ought to have been mentioned for the reasons which I have given.

That being so, the only question left is the question as to the waiver clause. I should not like myself to say that, in every case where contracts are known to exist, the statement that there may be contracts which ought under the 38th section to be specified would of necessity make the waiver clause tricky or misleading, or cause it to be calculated to deceive, which I think is the safer expression to use. I think that in each case you must look at the collocation of the words, and I think that in this particular case the break in the two first sentences does tend to make the words "there may be" refer rather to the existence of the contract than to the fact of the contract being of such a character as to fall within the section. All I wish to guard against is it being supposed that the use of the words "may be" must always make the waiver clause misleading. I think you have first to look at the collocation of the words, as I have said, and, secondly, you have to look at the facts and see what is the nature of the contracts which in

fact have been entered into and are known to the directors. I gave an example in the course of the argument of a supposed shipping company, in which the promoters had secured the services of captains and engineers and others who were versed in the particular seas in which the proposed ships of the new company were to run. I cannot conceive that, because it is said that there may be contracts which ought to be scheduled under s. 38, it would in the case of contracts of that character make the waiver clause so misleading as to prevent the promoter, or whoever was the defendant in the action, relying upon it as against the shareholders who had taken shares upon the basis of the waiver clause.

On the other hand, it is obvious that with regard to some important contracts, with regard to a contract, I should say, of the character of the contract in the letter of March 10—if it is to be treated in the way in which it was treated by Farwell J., who treated it on the evidence, apparently according to the contention of the plaintiff, as being a contract for lending the name. The user of the words "may be," even qualified with the words "which ought to be scheduled under s. 38," would make such a waiver clause misleading or calculated to deceive; and in this particular case I think that the waiver clause, having regard to its exact terms, and having regard also to the nature of the contract which was not mentioned, is a clause which cannot be relied upon as preventing the shareholder who took his shares upon the basis of that clause from suing for damages under s. 38. As I said in the course of the argument, I think, whether because the matter went through hurriedly, or whatever the reason might be, that the advice of counsel that the letter of March 10 did not require to be scheduled because of the general words in the waiver clause about the underwriting agreement was not sound. We all make errors of judgment, especially on questions of law. I only express my opinion that that was an error of judgment, and that this letter would not have been covered by the waiver clause, even treating the contract as a contract in the very terms of the letter.

I wish to add this—that I entirely agree with what I understand to be the meaning of the Master of the Rolls in

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Greenwood v. *Leather Shod Wheel Co.* (1) I understand his observations to mean that there is nothing in the enacted law, as it stands, to prevent a waiver clause being enforced, if it is honestly made and is not misleading; and if that is the case, I do not think that we have any power sitting here as judges to legislate and say that a waiver clause cannot be entered into so as to debar a person who has taken shares from suing under the provisions of s. 38. Of course, one knows there is a class of cases in which you cannot contract yourself out of the benefit of the statute. No one suggests that s. 38 of the Act of 1867 comes within that class of case. I think, therefore, that this appeal ought to be dismissed, and dismissed with costs.

ROMER L.J. I agree with the conclusion arrived at by my Lord and by Farwell J. I confess that, for myself, this seems a clear case, and I need only add a very few words. In the first place, I cannot doubt that the true contract, which was made by the defendant Mr. Keswick, was one which, under the provisions of s. 38, ought to have been specified in the prospectus, and that the omission of it from that prospectus compels this Court to deem the prospectus fraudulent on the part of this defendant. But I should like to say that, wholly apart from the provisions of s. 38, in my opinion, in common fairness to the intending investor, to whom a prospectus of this kind is issued, such a contract as we have here to deal with ought to be specified and referred to in the prospectus, and I am bound to say that, in my opinion, in this case s. 38 works no injustice. I will only further say, with regard to the so-called waiver clause, that it gives no fair or sufficient notice to any intending investor that such a contract as this exists, and that the investor is to waive the omission of its details from the prospectus. Further, I think that, in the circumstances of this case, it was not open to this defendant to say that the waiver clause had the meaning and operation now contended for on his behalf. I agree in thinking that the appeal should be dismissed with costs.

(1) [1900] 1 Ch. 421.

STIRLING L.J. I am of the same opinion on both points. I think that the contract—by which I mean the real contract—made between Mr. Keswick and the promoters is one which ought to have been disclosed. It was a contract made by the promoters of the company with a gentleman who was to be, not merely a director, but the chairman of the company, and the effect of it was that a firm, of which that gentleman was a member, were to receive from the promoters a large sum by way of remuneration for the performance of certain services to the company. The nature of these services is stated by the gentleman himself in his evidence. [His Lordship read the account given by Keswick at the trial of the action of the services to be rendered by the firm in return for the 10,000*l.*]

It may be observed that some of these things are matters which in the ordinary course would have to be dealt with by the board of directors as such, and further that they would not fall within the scope of the ordinary duties of commercial agents, which the firm of Matheson & Co. were to be. Now the question is, would the knowledge of such a contract affect the mind of a reasonable investor thinking of taking shares in this company? It seems to me that where we find a contract between promoters and the future chairman of the company, and that the chairman is a member of a firm who are to get a large benefit from that contract, that is a fact which naturally would influence the mind of an intending investor.

Then it is said that the plaintiff is prevented from availing himself of any remedy under the statute because he has waived the benefit of the statute by the terms of his contract. I entirely agree with what has just been said by the Lord Justice, that we are not to hold that it is impossible for an intending shareholder to exclude himself from the benefit of the statute by an express stipulation of this kind; but when persons who issue a prospectus make statements in that prospectus with reference to the contracts, in respect of which the benefit of the statute is to be excluded, they must be such as to be in all respects well founded in fact, and fairly to convey to the mind of the intending shareholder the nature of the contracts which have been excluded. Now, in my judgment, that condition is

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not fulfilled by the terms of this prospectus. I think that the contract, being what I have stated it to be, is not and could not reasonably be supposed to be comprised in any one of the classes of contracts which are referred to in the waiver clause. But it is said (and Mr. Keswick, the defendant, in his evidence has relied upon it) that having taken great pains, as he evidently did, with reference to the prospectus, and having obtained legal advice as to whether or no everything had been disclosed which ought to have been disclosed in it, he ought not to be held liable. Unfortunately for him, as it appears to me, he never communicated to those who advised him the real nature of the contract. However unfortunate the omission so to do may be, it seems to me that in these circumstances he is not entitled to avail himself of the benefit of the waiver clause. I agree, therefore, that the decision of Farwell J. should be upheld.

Solicitors: *Rowcliffes, Rawle & Co., for Clayton & Gibson, Newcastle-on-Tyne; Stephenson, Harwood & Co.; Nicol, Son, & Jones; Neish, Howell & Macfarlane.*

H. B. H.

JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED *v.* SAMUEL.

KEKEWICH J.

1902

June 11, 18.

[1902 J. 329.]

Mortgage—Stock—Clog on Equity of Redemption—Option to Purchase Mortgaged Stock.

A loan was made to a company on the terms of a letter whereby the borrowers agreed to secure the repayment of the loan with interest by the transfer of certain debenture stock, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and payable with interest at thirty days' notice on either side:—

Held, applying *Noakes & Co.* v. *Rice*, [1902] A. C. 24, that the stipulation giving the option to purchase the mortgaged stock was a clog or fetter on the right of redemption, and accordingly void.

TRIAL OF ACTION.

The plaintiffs were a limited company incorporated under the Companies Acts, 1862–1900.

In the year 1901 the defendant offered to advance to the plaintiffs the sum of 5000*l.* under the circumstances and upon the security and terms which were set out in a letter dated June 11, 1901, addressed to the plaintiffs, and signed by the defendant. The letter was as follows:—

"To the Secretary of the Jarrah Timber and
Wood Paving Corporation, Limited.

"Dear Sir,—With reference to the various conversations I have recently had with Mr. H. Bateman, one of your directors, who is, I understand, authorized to negotiate a loan to your company upon the security of 30,000*l.* of its first mortgage debenture stock, I request that you will be good enough to inform your board that I am willing to advance the company, at 6 per cent. per annum, the sum of 5000*l.* sterling forthwith, against transfer to me of such stock as collateral security, subject to your directors electing my nominee upon the board, to my having the option to purchase the whole or any part of such stock at 40 per cent. at any time within twelve months,

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and, in the event of the company at any time hereafter electing to raise any further capital, or to sell its undertaking by way of amalgamation or in any other manner for shares or stocks in another company, to my having the refusal of underwriting by way of guaranteeing the taking up of such new capital, shares, or stock at a commission of 10 per cent. thereon. The advance to become due and payable with interest at thirty days' notice on either side. An amount equal to the 1st July half-year's interest accruing on 30,000*l.* debenture stock, and to all subsequent interest accrued on that sum during the currency of the advance, to be paid to me on due date of payments, and credited to the company in reduction of the principal of the advance. In the event of my exercising the option to purchase the whole or any part of the debenture stock at 40 per cent., an amount equal to any interest that would have accrued thereon between now and the date of my exercising such option, if any stock had been issued, to be credited to me.

"In the event of the company requiring during the currency of the advance a further advance of 750*l.*, I will lend it that sum upon the same terms as the original advance.

"It is understood that the company forthwith proceeds to have the title to the 25,000 acres registered in its name and to have the mortgage registered. In the meanwhile the company to obtain from Sir William Ingram a document to the effect that he holds that estate in trust for the first mortgage debenture stockholders."

To this letter the plaintiffs sent a reply dated June 14, 1901, in the following terms:—

"Dear Sir,—I am instructed by my directors to acknowledge the receipt of your letter of the 11th instant, and hereby accept on behalf of the corporation the offer therein contained.

"The letter from Sir William Ingram stating that he holds the 25,000 acres of freehold land in trust for the first mortgage debenture holders will be sent to you in due course.

"Meantime, we send a letter authorizing Lloyd's Bank (Law Courts branch), 222, Strand, W.C., to hand you certificate for the 30,000*l.* debenture stock in exchange for 5000*l.*"

The certificate for the sum of 30,000*l.* first mortgage debenture stock was duly handed to the defendant, in exchange for the sum of 5000*l.*, on July 15, 1901, and the sum of 30,000*l.* first mortgage debenture stock was duly transferred to the defendant.

By a letter dated February 27, 1902, the defendant gave the plaintiffs notice that he thereby exercised the option to purchase in regard to the whole of the debenture stock.

The plaintiffs alleged that on the same February 27, 1902, and before the last-mentioned letter was written, they tendered the amount of the mortgage money to the defendant, and, on his refusing to receive it, gave to him due notice of their intention to pay him off; but upon the evidence his Lordship held that these allegations were not substantiated.

On the same day the plaintiffs brought this action, claiming (1.) a declaration that the option to purchase 30,000*l.* first mortgage debenture stock of the plaintiffs at 40 per cent. at any time within twelve months from June 11, 1901, purported to be given to the defendant on that date, was not binding on the plaintiffs and void; and (2.) a declaration that the plaintiffs were entitled to redeem the first mortgage debenture stock on payment to the defendant of 5000*l.* with interest at 6 per cent. per annum, and thirty days' interest at the like rate in lieu of notice, and costs, or in the alternative to redeem the debenture stock on thirty days' notice; and also claiming redemption and consequential relief.

Warrington, K.C., and *Martelli*, for the plaintiffs. The stipulation giving the defendant an option to purchase the mortgaged shares is a clog on the equity of redemption, and void according to the principle of the decision of the House of Lords in *Noakes & Co.* v. *Rice* (1), because (in the words of Lord Davey) it is a stipulation which "will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it." The provision in the contract as to giving thirty days' notice does not prevent the plaintiffs paying off at any

(1) [1902] A. C. 24, 33.

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time. It is a well-established rule that the object of such notice is to enable the mortgagee to find another investment for his money, and it is submitted (though there is no authority to that effect) that the mortgagor may therefore pay off at any time with interest in lieu of notice. But, further, from the inception of the contract the plaintiffs became entitled to a retransfer on the expiration of the notice; and, whether they are entitled to judgment for redemption or not, they are entitled now to the declaration which they ask for that the option is void. The exercise of the option is altogether incompatible with the mortgagor's right to redeem. The plaintiffs, therefore, are entitled to treat the contract as if the stipulation giving the option were not there, or, in other words, so far as redemption is concerned, the stipulation is void. *In re Edwards' Estate* (1) is an authority to shew that an option of purchase such as this is necessarily bad. No doubt it may be said, in the light of recent decisions, that the learned judge in that case put his decision to some extent on a wrong ground, because it must be conceded that the principle now is that, as between mortgagor and mortgagee, a collateral stipulation may be inserted, provided it is not unconscionable and not incompatible with the right to redeem; but an option to purchase is incompatible, and on that point the case is a direct authority. In *Lisle* v. *Reeve* (2) Buckley J. thought that a condition which gave mortgagees an option of purchase, and which must be performed (if at all) before the legal right of redemption would arise, was a conditional sale, and therefore valid; but that conclusion was not approved by the Court of Appeal, and moreover the learned judge, as appears from the passage in square brackets added by him in revising the report (3), was not dealing with a case like the present one, namely, "the case of a mere equitable charge where the right of redemption is equitable from the first," but with the case of a legal mortgage with a legal right to redeem at a defined time. *Lisle* v. *Reeve* (2), therefore, for the present purpose is devoid of authority.

(1) (1861) 11 Ir. Ch. Rep. 367. (2) [1902] 1 Ch. 53.
(3) [1902] 1 Ch. 66, 67.

P. O. Lawrence, K.C., and *J. W. Manning*, for the defendant. It is submitted that this option of purchase does not come within the class of cases in which a provision in a mortgage has been held to operate as a clog or fetter on the equity of redemption. In White and Tudor's Leading Cases, 5th ed. vol. ii. p. 1064, it is stated that "if a mortgage be made redeemable upon payment of the mortgage money at a certain day, but if the money be not then paid, if the mortgagee will pay a further sum to the mortgagor, that then his estate shall be absolute, or that he will make him a further conveyance or anything to that effect, the estate is, notwithstanding, redeemable after the day of payment, and the mortgagee cannot enforce the mortgagor, after default to make him an absolute estate, until he forecloses him," and authorities are cited in support of the statement. That is a fair exposition of the reason for holding the stipulation bad, and that reason does not exist here. This is a perfectly fair commercial transaction between parties competent to deal, and the law should strive to uphold it. All the authorities on the subject are cases in which a mortgagee stipulates that, in default of payment by the mortgagor, he shall have the right to buy the property, or that on payment of an additional sum the property shall become his free from the mortgage debt. The stipulation in the present case is quite independent of non-payment. It is altogether collateral, and as such within the decision in *Noakes & Co.* v. *Rice* (1), where it is expressly recognised that a collateral stipulation may be validly inserted in a mortgage. If the thirty days had been running, it is admitted by the defendant that the option could not have been exercised. In *Noakes & Co.* v. *Rice* (2) Lord Davey enunciates three doctrines which are applicable to this question. On examination it will be found that the present case does not offend against any of those doctrines. If the plaintiffs had given the thirty days' notice at once, they would have got the whole of their property back. And after the option is exercised they will get back that which they bargained for, because they have agreed that the property should be converted into money.

But, further, it is contended on the authority of *Lisle* v.

(1) [1902] A. C. 24. (2) [1902] A. C. 32.

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Reeve (1) that this contract is not a mortgage, but a conditional sale. No doubt some portions of the judgment of Buckley J. were impugned in the Court of Appeal, but not so the part of it on which reliance is placed. The learned judge states suppositious cases (2) substantially similar to this case, and sums them up by saying that a contract that in a certain event there shall be no right to redeem at law is good: "It is a conditional sale."

The defendant's case, therefore, may be put in two ways; first, if the contract is a mortgage there is no clog on the equity within the old cases or within *Noakes & Co.* v. *Rice* (3); and secondly, if the contract is a conditional sale, it has been shewn that before the right to redeem arose the defendant exercised his option.

[They referred also to *Carritt* v. *Bradley*. (4)]

[KEKEWICH J. intimated that he did not desire to hear further argument on the point as to conditional sale.]

Warrington, K.C., in reply. Then the only question is whether the option of purchase is a collateral advantage for which the mortgagee could lawfully stipulate. It appears to be exactly within the words of Lord Davey, already quoted, in *Noakes & Co.* v. *Rice*. (5) In the case of *Carritt* v. *Bradley* (4) the stipulation was that the mortgagee should be employed as broker to a tea company, shares in which were mortgaged to him. That is an excellent instance of a collateral stipulation, not affecting the subject-matter of the mortgage, and is as different as possible from the present case.

Cur. adv. vult.

June 18. KEKEWICH J. The question on which judgment was reserved is whether a particular stipulation in the contract between the parties which is contained in the letter of June 11, 1901, set out in the statement of claim, is a clog on the plaintiffs' equity of redemption under that contract, and is therefore void. I dealt with the facts and with some subsidiary points

(1) [1902] 1 Ch. 53.
(2) Ibid. 67, 68.
(3) [1902] A. C. 24.
(4) [1901] 2 K. B. 550.
(5) [1902] A. C. 33.

at the trial, but it may be convenient here to repeat my conclusions. It was contended on behalf of the plaintiffs that they had tendered the money due on February 27, 1902—that is, before the letter of the same date by which the defendant gave them notice of exercise of his option of purchase. My opinion on the evidence is that no tender was in fact made; but the point is immaterial because by the terms of the contract thirty days' notice of payment was required, and was not given, and it is admittedly clear that, without that, the plaintiffs could not insist on immediate redemption. The suggestion that the defendant was bound to accept interest in lieu of notice has, and was really admitted at the bar to have, no foundation. But it is said that what took place at the interview of the 27th was equivalent to notice, or at least was an intimation by the plaintiffs to the defendant that they wished to pay him off, and, that after that intimation received, the defendant could not exercise his option of purchase. I do not think that what passed can be treated as equivalent to the notice required by the contract; but, if it were, such notice would not, in my judgment, defeat the defendant's right according to the terms of the contract. It seems to me that the option of purchase was reserved to him, at least so long as the mortgage continued, and that an intention to redeem, even though formally notified, could not defeat it. There is no occasion to say more on these points, and I can now proceed directly to the main question.

The transaction was shortly this. The defendant advanced 5000*l.* to the plaintiffs, and they agreed to secure the repayment with interest by the transfer of 30,000*l.* debenture stock. The defendant stipulated, first, that a nominee of his should join the plaintiffs' board; secondly, that he should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months; and, thirdly, that in the event of the plaintiffs' undertaking being disposed of, he should be entitled to underwrite new capital at a fixed commission. We are not concerned with the first or third of these stipulations, the question arising entirely on the second. Was that a clog on the equity of redemption?

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It may be that the contract means that the option of purchase shall not be exercisable after repayment of principal and interest. If the contract means this, the case would be brought within the doctrine laid down by Buckley J. in *Lisle* v. *Reeve*. (1) But, in the first place, I do not myself think that this is the true meaning of the contract; and, secondly, having regard to what was said in the Court of Appeal in the same case of *Lisle* v. *Reeve* (1), Buckley J.'s doctrine cannot be regarded as sound. For that I rely on the judgments in the Court of Appeal, and comments of my own would be impertinent. As regards the meaning of the contract, I need only say that there is not a word in it indicating that the option of purchase was not intended to be exercisable at any time within twelve months whatever happened in the interval, and I cannot see that the nature of the contract itself in any wise precludes the literal construction. When the defendant on February 27 was asked to retransfer the stock on payment of principal, interest, and costs he insisted on this view of the contract, and I think he was right. The question is whether the law allows it.

Taking the contract to mean what I say it does mean, the stipulation that the defendant shall for twelve months have an option to purchase the mortgaged stock at a certain price is, in my opinion, a clog or fetter on the plaintiffs' right to redeem. Some other cases have been referred to, but it is better to be content with *Noakes & Co.* v. *Rice* (2), because it is a decision of the House of Lords, and the doctrine here sought to be applied is there stated in a manner which can leave no possible room for misunderstanding. It would be easy to quote the language of more than one learned Lord who took part in the decision in order to shew what test is to be applied here, but I will take one passage only from the judgment of Lord Davey, who says (3): "The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage trans-

(1) [1902] 1 Ch. 67. (2) [1902] A. C. 24.
(3) [1902] A. C. 34.

action, it is but part of his security, and necessarily comes to an end on the payment off of the loan." It is really not arguable that the stipulation in question was not part of the mortgage transaction, and part of the security. It is so expressed on the face of the contract, in which the defendant expresses his willingness to advance the money subject to, among other things, his having this option to purchase. And, of course, it was for the benefit of the mortgagee. Therefore, to use Lord Davey's phrase, it necessarily comes to an end on payment off of the loan. There was nothing to prevent the plaintiffs giving the thirty days' notice immediately after the advance—that is to say, they might by their act have determined the loan at the expiration of a month, and yet, according to the express bargain, the defendant might for eleven months from that time have had the right to prevent the plaintiffs from dealing with the debenture stock, because he had, during that period, the right to say that if he pleased he would purchase it at a fixed price. Thus regarded, it is rather an extravagant instance of a clog or fetter of a right to redeem, inasmuch as it interferes with the ownership of the very property which is made the security for the loan. In this respect the transaction bears a close resemblance to that in *Noakes & Co.* v. *Rice* (1), where the mortgagee sought to impose a tie on a public-house after redemption.

The plaintiffs will therefore have a declaration that the stipulation giving the defendant an option to purchase at any time within twelve months at 40 per cent. is void, and that they are entitled to redeem, and have the stock transferred as they shall direct on payment of whatever is due for principal, interest, and costs, with consequent relief.

Solicitors: *H. Percy Becher; Dale, Newman & Hood.*

(1) [1902] A. C. 24.

C. C. M. D.

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[1900 C. 3525.]

Gavelkind—Descent—Partibility—Collaterals.

The partibility of lands held in gavelkind among the heirs in equal shares extends to collaterals of every degree, and is not confined to brothers and their issue or nearer relations. The custom of gavelkind is the common law of the land in Kent, and its extension to collaterals is, therefore, a question for the judge, and need not be proved by usage, as in the case of a manorial custom which is in contravention of the common law.

Francis Chenoweth, the testator in this matter, died on March 23, 1900, possessed of gavelkind land in Kent. He made a will which purported to dispose of his residuary real and personal estate. This summons was taken out to have the construction of the will determined. By an order made in the summons on May 16, 1901, it was declared that there was an intestacy as to the testator's residuary estate, and inquiries were directed who were the testator's next of kin, heir-at-law, and heir or heirs according to the custom of gavelkind.

The chief clerk ascertained that the only male relatives of the testator living at his death were two first cousins, namely, Samuel Chenoweth and Joseph Chenoweth, both younger sons of the testator's only uncle, William Chenoweth, by different wives, and three first cousins once removed, namely, John Augustus Chenoweth, Francis Chenoweth, and William Benjamin Chenoweth, the three sons of John Cyrus Chenoweth, the eldest son of the testator's said uncle.

Upon this state of facts the matter was brought before the judge, upon a summons to proceed with the inquiries directed by the order, in order to determine the question whether the custom of partibility of gavelkind land among all the male heirs extended beyond brothers and their issue, or whether on failure of brothers and their issue the common law rule of descent applied.

Jenkins, K.C., and *Greenwood*, for the heir-at-law. The presumption is in favour of the heir-at-law. The burden of proof is on those who uphold the custom. There is no general principle as to extension of a custom to collaterals. It is a mere question of evidence; the custom extends so far as it is proved to extend, and no further: *Muggleton* v. *Barnett*. (1) Here there is no evidence at all, and the authorities are in favour of the heir-at-law.

Hook v. *Hook* (2) is quoted as an authority that the divisibility extends to all the descendants of brothers; but that was decided upon the ground that the ordinary incidents of descent attach to customary descent; the jus representationis under the Statute of Inheritance extends to the whole of the stirps when the stirps has once been admitted. All the brothers are customary heirs, and therefore the lineal descendants of such brother take by representation his share, and of course, as between themselves, take it in equal shares. If you once admit a stirps as heir according to the custom, the custom extends throughout the stirps. That is a very different thing from admitting more distant relations, as uncles, as customary heirs. William, the father of Mr. Upjohn's client and grandfather of mine, being the intestate's uncle, would take as heir at common law, and the same rule must be applied throughout his descendants. That principle is laid down in Bacon's Abr. (Descent (D), p. 641), and he there states, quoting Co. Litt. 140 a: "The general custom of gavelkind lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good."

[*Upjohn, K.C.* In the edition of Co. Litt. of 1832 there is a note by Mr. Hargrave: "This extension of the custom of gavelkind to collaterals prevails universally in Kent"; and that note was retained by Mr. Butler when he published Hargrave's uncompleted edition.]

That only carries the custom to brothers and, by representation, to their sons. In *Doe* v. *Gooding*, which is stated in Chitty on Descents, p. 183, the opinions of three eminent conveyancers are set out in full: those of Mr. Peckham and

(1) (1857) 2 H. & N. 653. (2) (1862) 1 H. & M. 43.

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Mr. Butler were against the extension to collaterals, that of Mr. Preston in its favour. There seems to have been no judicial decision.

[FARWELL J. The heir-at-law appears to have retired.]

If the custom really extended to all collaterals, it would have been very easy to have produced evidence; but there is none. There is no judicial decision, and there is a conflict of opinion among old conveyancers and text-writers. The Court will not extend the custom in the absence of evidence.

Upjohn, K.C., and *J. R. Stainer*, for the younger sons and grandsons of William Chenoweth. The authoritative statements of the law, statutory and other, are strongly in favour of the extension to collaterals. Gavelkind is not a custom contrary to the law, but the common law of the land where it prevails, and the argument from the proof necessary for manorial customs does not apply.

As to authorities, in the statute (1324) De Prerogativâ Regis (17 Edw. 2, c. 16), after mentioning several customs, it is stated: "In Kent in gavelkind all heirs male shall divide their inheritance."

The Act 31 Hen. 8, c. 3 (1539), which disgavelled certain lands, provides that they, "the which now been of the tenure and nature of gavelkind, and heretofore have been departed or departible between heirs males by the custom of gavelkind, shall from henceforth be clearly changed from the said custom, tenure and nature of gavelkind, and in no wise hereafter be departed or departible &c. but shall remain, revert, abide, descend, come and be . . . . according to the common law of this realm." In many passages in the Year Books, e.g., in 2 Edw. 3, p. 12, pl. 5; 3 Edw. 3, p. 38, pl. 12; 5 Edw. 3, p. 64, pl. 107; 8 Edw. 3, p. 42, pl. 10, it is stated that gavelkind is the law of the land in Kent, and a distinction is taken between the custom of partibility among heirs in particular manors, where the custom must be proved by usage, and in gavelkind, where no proof of actual usage is necessary. In 26 Hen. 8, p. 4, pl. 19, it is stated that all tenements held in gavelkind are partible without putting any limit on the generality of the custom.

In the matter of descent, gavelkind was merely a preservation of the old Saxon common law, which was superseded after the Conquest: Glanvill, lib. 7, cap. 3, quoted in Robinson on Gavelkind, 5th (Elton's) ed. p. 19. Brooke's Abr., tit. "Customes," 1, speaks of gavelkind as "the custom of the land," and Rolle's Abr. vol. i. p. 623, A 2, is to the same effect. It was never necessary in the case of land in Kent to plead that the land always had been divided, for gavelkind land in Kent was "partible in nature": Lambarde's Perambulation of Kent, ed. 1596, pp. 535, 536; ed. 1826, p. 483; Somner on Gavelkind, 2nd ed. p. 53. That disposes of the argument that evidence is necessary to prove the extent of the custom. All the writers of text-books state the custom as extending to collaterals indefinitely: Co. Litt. 140 a; Custumal of Kent (printed at the end of Lambarde's Perambulation, ed. 1596, p. 574; ed. 1826, p. 518); Watkins on Descent, 4th ed. p. 97; Bacon's Abr. vol. iv. tit. "Gavelkind," p. 54; Joshua Williams on Real Property, 19th ed. p. 59; Cruise's Digest, 4th ed. vol. i. tit. "Tenures," p. 38, § 38.

But if evidence is necessary, there are several cases in which collaterals of a much more remote degree than the issue of brothers have been admitted as co-heirs, e.g., the case referred to by Mr. Boteler, Recorder of Canterbury (Chitty on Descents, p. 186), and *Cole* v. *Wade* and *In re Fullager*, cited in Mr. Wilson's note to Robinson on Gavelkind (3rd ed. p. 117), reprinted in Mr. Elton's note (5th ed. p. 93). We have examined the record in *Cole* v. *Wade*. The statement in the note is not accurate. It is recited in one order in the case that persons who were the testator's second cousins and second cousins once removed were his co-heirs-at-law; but the master's final report states that the testator's heirs in gavelkind were three persons who were his seventh cousins, and this report was acted upon. The case, therefore, is a much stronger one than appears from the note. A single instance is sufficient to prove a custom: *Doe* v. *Mason*. (1)

Jenkins, K.C., in reply. The land in Kent is not all gavelkind; so the custom of gavelkind cannot be treated as common

(1) (1770) 3 Wils. 63.

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law. If it be the survival of the old common law, that survival is a privilege of certain lands contrary to the present common law, and the extent of the privilege must be proved like that of any other custom. The statements as to pleading merely shew that you could plead gavelkind generally; they have no application to a case where the question is, "What is gavelkind?" The statements in the statutes and the Year Books are in very general words, and neither the Legislature nor the Courts had any question as to collaterals before them. Mere general words such as these could not establish a rule.

FARWELL J. The question I have to determine is whether the customary descent in gavelkind stops at the relationship of brothers and their issue, or extends to all branches and degrees of relationship, however remote. In my opinion this is a question of law, and not, as Mr. Jenkins has argued, a question of fact. In the 5th (Mr. Elton's) edition of Robinson on Gavelkind, p. 28, it is stated: "It is plain that the continuance of this custom in Kent stood in no need of any confirmation from the Conqueror, since it was in his time the common law of the kingdom." And in the 3rd (Mr. Wilson's) edition of Robinson, at p. 50: "From the judicial knowledge of our custom it follows, that if heirs in gavelkind bring an action ancestral, and declare on the custom, it cannot be traversed that there is no such custom of gavelkind; for it is the common law where it is used; and it is of record, and known at the common law, and therefore twelve men shall not make trial of it." The materiality of that is this. An ordinary custom, such as the custom of a manor, is a contravention of the common law. The custom has to be proved, and extends no further than the user of it which is proved. I accept Mr. Jenkins' proposition, taken from the judgment of Crompton J. in *Muggleton* v. *Barnett* (1): "The authorities seem to me to establish the rule, that proof of a custom of descent, contrary to the course of the common law, prevailing in a nearer degree of consanguinity is no proof of such custom extending to a more remote degree." But this is irrelevant in

(1) 2 H. & N. 653, 661.

the consideration of that which is a portion of the law of the land; and in Kent gavelkind, as Robinson says, is the common law of the land. Now, in order to ascertain what is the common law when there are no decisions, it is the practice of the Court to refer to the opinions of persons who are deceased and were in their lives learned in the law. The common law of England was itself unwritten, and has been described as "an antient collection of unwritten maxims and customs" (Steph. Com. 11th ed. vol. i. p. 10). In order to ascertain what it is when there are no decisions to guide the Court, we have regard to the wisdom of our ancestors, and to their view of the law. It is to me reasonably plain, assuming it to be a question of law and not of fact, that the opinions of the great majority if not of all the persons learned in the law which have been cited are in favour of the generality of the partibility of the gavelkind lands among all descendants. In the third report of the Real Property Commissioners at p. 8, tit. "Gavelkind," I find this: "This custom prevails with respect to socage lands, over almost the whole of the county of Kent, and in a qualified manner, over copyhold lands in various parts of the kingdom. . . . The principal peculiarities which distinguish socage lands subject to the custom of gavelkind, from free and common socage are: That the land descends to all males in equal degree, in equal shares."

This perfectly general statement is not confined to brothers and their issue, but extends to "all males," and this is consistent both with the old authorities and also with the Acts of Parliament which have been cited. To my mind, the disgavelling Act of 31 Hen. 8 is particularly important, because the Legislature thought it necessary not merely to disgavel, but to go further, and declare that the common law should apply to the land so disgavelled. But if the custom were similar to a manorial custom and contrary to the common law, the land when disgavelled would have been subject to the common law without more: the common law would have revived as soon as the custom was removed. That is not the case with gavelkind lands, and in fact that is pointed out in a quaint passage in Lambarde's Perambulation of Kent (ed.

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1596, p. 535; ed. 1826, p. 483): "For it is holden, 16 E. 2, Præscription, 52, in Fitzherbert, that albeit the eldest sonne only hath (and that for many discents together) entered into Gavelkynde land, and occupied it without any contradiction of the younger brothers, that yet the lande remaineth partible betweene them, whensoever they will put to their claime. Against which assertion, that which is saide 10 H. 3 in the title of Præscription, 64, namely of the issue taken thus, Si terra illa fuit partibilis, et partita, nec ne, is not greatly forceable. For it is not expressly there spoken of Kent (where the custome is most generall) and although it were so that the land were never departed in deede, yet if it remain partible in nature, it may be departed whensoever occasion shall be ministred . . . . And this caused them of the Parlement (31 H. 8, cap. 3) to speake in the disjunctive, that have beene departed, or bee departible. Yea, so inseparable is this custome from the land in which it obteineth, that a contrarie discent (continued in the case of the Crowne itselfe) cannot hinder, but that (after such time as the lande shall resort again to a common person) the former inveterate custome shall governe it."

The custom of gavelkind, therefore, appears to me not against the common law, but, as stated in some curious cases in the Year Books, to be in fact the common law of the land in Kent.

In Chitty on Descents, p. 186, I find this statement: "From the cases in the Year Books, 2 Edw. 3, p. 12, 8 Edw. 3, p. 42, it seems clear that gavelkind lands are 'departible enter males' generally; and it may be concluded that the general partible and divisible quality of lands of gavelkind tenure is, as it is frequently termed, 'the common law of Kent,' and this being the case, the custom must of necessity extend to collaterals."

The statement in Brooke's Abridgment (tit. "Customes," 1) is to the same effect, and so are the Year Books which have been referred to, and the statute De Prerogativâ Regis, 17 Edw. 2, c. 16. In fact, so far as I can see, there is no authority, except the opinions of two conveyancers to which I shall refer presently, contrary to the proposition that the

custom of gavelkind in Kent is really the common law of the land in Kent, and not a custom of the county contrary to the common law of England. I may refer also to the authorities that have been cited from the works of Cruise, Joshua Williams and Watkins in addition to those that I have read of Chitty and Robinson. There is indeed considerable authority, though no decision, on this point, and in Mr. Elton's edition (5th) of Robinson on Gavelkind, p. 89, the result is thus stated: "The descent of lands in Kentish gavelkind has long been settled as being among all the sons, or their representatives, and in default among all the daughters or their representatives, and so in the case of the males and females in other degrees." Mr. Elton himself was very learned in matters of this kind, and his opinion is properly cited and carries great weight. He expresses no doubt as to the generality of the proposition. He states it again on p. 93: "The extension of the Kentish custom to collaterals of every degree is proved partly by the generality of the language of the ancient records, which usually state that the lands are 'partible among the males,' as in the statute De Prerogativâ Regis, 17 Edw. 2, c. 16, and in the Year Books, 3 Edw. 3, p. 38, pl. 12; 26 Hen 8, p. 4, pl. 19, and partly by the modern practice and the common reputation in the county that the custom extends to the most remote collateral degree."

Without going over all the books again, it is sufficient to say that there is an overwhelming body of authority, so far as the question of law is concerned, in favour of the generality of the divisibility of lands in gavelkind. I do not understand that the conveyancers' opinions cited in *Doe* v. *Gooding* and set out in Chitty on Descents, p. 183, are intended to be final opinions on the point; but even if they were, they could not outweigh those that I have already referred to. The opinion of Mr. Butler appears to a certain extent to be contrary to mine; but that of Mr. Preston—a great name—supports my view. Mr. Butler also regarded it as a question for a jury; but, with all deference to him, I cannot agree. If I am right that the question is one of law, it is not one for a jury, but for the judge.

But even if it were a question of fact, I have sufficient

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evidence on the records of the Court to decide the point in favour of the gavelkind heirs on the facts. In *Doe* v. *Mason* (1), a case of a custom of a manor, one instance of admission of a youngest nephew was held sufficient evidence of a custom that the youngest nephews should succeed in that particular manor.

The case of *Cole* v. *Wade* is thus stated in Mr. Elton's note to the 5th edition of Robinson on Gavelkind, p. 93: "In a partition suit in Chancery about 1790 second cousins and second cousins once removed, were accepted as co-heirs in gavelkind." Counsel have examined the record in that case, and it appears that the note is inaccurate, and that the persons admitted as co-heirs were seventh cousins—a much more remote degree of relationship than I have to deal with here. That is one instance verified by counsel. The same note states a case in Lunacy—*In re Fullager*—in 1812: "On a reference to ascertain who were his heirs in gavelkind, the master reported that several descendants of six sons of the lunatic's two aunts were his co-heirs in gavelkind and the report was confirmed." I have no reason to doubt that that statement is accurate, and it gives another instance in which the custom was extended far beyond the degrees to which it is suggested that it is confined.

Those cases are taken from a collection made in Mr. Wilson's note to the 3rd edition of Robinson on Gavelkind, pp. 116–118, in which, after stating some of the authorities which have been cited, he says: "These authorities, it is apprehended, are sufficient to establish the custom in the most remote collateral degrees. The editor has been favoured with the briefs in the late case of *Doe* v. *Gooding*, which was an ejectment, brought by the son of the youngest son of an uncle of the deceased, against the eldest son of the uncle, the defendant being the heir at common law, and the lessor of the plaintiff claiming as co-heir in gavelkind. It appears that many attorneys, of great experience in the county, were ready to prove that, according to the general reputation, the custom extends through all the branches of inheritance; and various instances were collected of the customary partition between

(1) 3 Wils. 63.

the descendants of uncles and great-uncles. It may not be improper to mention two or three of those instances. On a trial at nisi prius in the year 1790, Thomas, Sarah, Richard and Boys Pilcher, descendants of three sons of Stephen Pilcher, who was a great-uncle of John Eaton the intestate, recovered as co-heirs of Eaton." Then he states the cases of *Cole* v. *Wade* and *In re Fullager*, which I have already mentioned, and adds: "The case of *Doe* v. *Gooding* was abandoned by the defendant."

If, then, I have to regard the question as one of fact and not of law, it appears to me that these instances afford sufficient evidence to enable me to decide in accordance with the view expressed by those learned in the law who are authorities on the subject.

I hold therefore that, according to the custom of gavelkind, the partibility among heirs of the same degree extends to all degrees of remoteness.

In dealing with the authorities I should have mentioned that I attach great weight to the fact that Mr. Hargrave's note to Coke, 140 a, was retained by Mr. Butler after the date of his opinion in *Doe* v. *Gooding*.

Solicitors for all parties: *Calkin Lewis & Stokes.*

BUCKLEY J.

1902

June 3.

In re CARATAL (NEW) MINES, LIMITED.

[00137 of 1902.]

Company—Winding-up—Special Resolution—Declaration of Chairman—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The declaration of the chairman of a meeting called to pass a resolution under s. 51 of the Companies Act, 1862, is not conclusive where the declaration shews on the face of it that the statutory majority has not voted in favour of the resolution.

In re Hadleigh Castle Gold Mines, Limited, [1900] 2 Ch. 419, and *Arnot* v. *United African Lands, Limited*, [1901] 1 Ch. 518, distinguished.

THE Caratal (New) Mines, Limited, was registered under the Companies Acts, 1862 to 1893, in the year 1896, and its articles of association provided (clause 58) that "at any general meeting, unless a poll is demanded by at least five members personally present, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution"; and (clause 61) that "every member shall have one vote for every share held by him."

On July 30, 1901, the former of the two meetings required to pass and confirm a special resolution was held, and resolutions were then proposed—(1.) that it was desirable to reconstruct the company, and accordingly that the company should be wound up voluntarily, and that a person named should be appointed liquidator; (2.) that the liquidator should be authorized to consent to the registration of a new company; and (3.) that a draft agreement between the old company and its liquidator and the new company should be approved. After considerable discussion the resolutions were proposed and seconded; and after an amendment had been rejected, the chairman said, "I will now put the resolutions for the reconstruction." There was then a show of hands, on which he said, "Those in favour 6; those against 23; but there are

200 voting by proxy, and I declare the resolutions carried as required by Act of Parliament."

No poll was taken or demanded. The resolution was confirmed as a special resolution at a subsequent meeting. As one of the defences to a petition by creditors for a compulsory winding-up order, it was set up that the company was in course of being wound up voluntarily, and that the rights of the creditors would not be thereby prejudiced.

Gore-Browne, K.C., and *Martelli*, for the petitioners. The resolution for voluntary winding-up is invalid. On a show of hands only the hands of the persons actually present can be counted, and it is improper for a chairman to count a vote for each member who has given a proxy: *Ernest* v. *Loma Gold Mines, Limited.* (1) The declaration of the chairman, therefore, contains intrinsic evidence that it is wrong, and it is not conclusive within s. 51 of the Companies Act, 1862. The defence that there is a voluntary winding-up is not open to the liquidator.

John Henderson, for the company and its liquidator. The voluntary winding-up is in existence. Sect. 51 says that the declaration of the chairman that the resolution has been carried "shall be deemed conclusive evidence of the fact." Apart from fraud the declaration is conclusive, and the Court will not go behind it: *In re Hadleigh Castle Gold Mines, Limited* (2), approved by the Court of Appeal in *Arnot* v. *United African Lands, Limited.* (3) It cannot be asserted that the chairman acted fraudulently. The petitioners want to make out that "conclusive" means primâ facie; but that construction has been rejected by the Courts.

BUCKLEY J. This is a petition by judgment creditors asking for a compulsory winding-up order against the company. The case involves one point which is of importance, because it arises on the construction of s. 51 of the Companies Act, 1862. That section defines a "special resolution" as a resolution

(1) [1897] 1 Ch. 1. (2) [1900] 2 Ch. 419.
(3) [1901] 1 Ch. 518.

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passed by a majority of not less than three-fourths of such members of the company for the time being entitled to vote as may be present in person or by proxy, where proxies are allowed, at one general meeting, duly convened, and confirmed by a majority of such members at a subsequent meeting held within a certain time. The section also provides that, "Unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same." [His Lordship stated the facts, and continued:—]

The respondents contend that the effect of that provision is that the declaration which the chairman here made is conclusive that the resolution for voluntary winding-up was passed by the necessary three-fourths majority. I am asked to affirm the proposition that if the chairman makes a declaration, and in it actually gives the numbers of the votes for and against the resolutions which he is bound to recognise, and adds that there are proxies (which in law he cannot regard), and then declares that the result is that the required statutory majority has been obtained, although the numbers stated by him shew that it has not been obtained, the declaration is conclusive. In my judgment that proposition cannot be supported. Suppose, for instance, that fifteen members voted for and fourteen against the resolution at the first meeting, and the chairman declared those figures and added that, as the statute only required a bare majority (in which he would be wrong in law), the resolution had been duly passed, would the declaration be conclusive? I think not. Or suppose the chairman said that fifteen voted for the resolution and fourteen against it, but that, as he was the holder of a number of proxies, he could although no poll had been demanded count the proxies, and that he therefore declared the resolution carried by a majority of three-fourths: that would not be a good declaration. It has been held that, if the chairman by his declaration affirms erroneously or without sufficiently ascertaining the facts but bonâ fide that a resolution has been carried,

the Court cannot go behind that declaration. Two cases establish that proposition—namely, *In re Hadleigh Castle Gold Mines, Limited* (1), and *Arnot* v. *United African Lands, Limited.* (2) In the latter case there was confusion at the meeting, but the Court came to the conclusion that the chairman had put the resolutions to the meeting properly and had declared them carried, and therefore declined to enter on an investigation as to what numbers voted for and against the resolutions. In the former case the meeting was a stormy one, and there was a considerable conflict of evidence as to what took place, and the Court refused to entertain the question whether the resolution was carried by the requisite majority. But those decisions do not apply to a case where the chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed. That is what the chairman has done in the present case. He had no right to count the 200 votes by proxy, and his declaration is not conclusive. If a poll had been demanded and the 200 votes had been available, other people might have given proxies, and the resolution might have been negatived. It is sufficient here for me to say that, on the face of the declaration, it is shewn that the resolution has not been passed by the majority required by the statute. That being so, there is no voluntary winding-up in existence.

[His Lordship then dealt with the other points of the case, and made the usual compulsory winding-up order against the company.]

Solicitors for petitioners: *Mayo & Co.*

Solicitors for company and liquidator: *Adler & Perowne.*

(1) [1900] 2 Ch. 419. (2) [1901] 1 Ch. 518.

F. E.

BUCKLEY J.

1902

May 29; *June* 5.

SUTTON *v.* ENGLISH AND COLONIAL PRODUCE COMPANY.

[1902 S. 1794.]

Company—Articles of Association—Qualification Shares—Holding Shares "in his own Right"—Bankrupt Director—Charging Order—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 14.

Where articles of association of a company require a director to be qualified by holding shares "in his own right," it is not necessary that he should hold the shares as beneficial owner, but to comply with the articles he must hold them in such a way that the company may safely deal with him in respect of the shares, whatever his interest in them may be. And although holding them as a trustee without beneficial ownership is a compliance with the articles, it is not a compliance if he holds them in a representative character.

Plaintiff was adjudicated a bankrupt in 1888 and never obtained his discharge. In April, 1902, he was a director of and held 1000 shares in a company the articles of association of which required that the qualification of a director should be the holding "in his own right" of 100 shares, and that his office should be vacated if he ceased to hold the qualifying number of shares. In the same month the plaintiff's trustee in bankruptcy wrote to the company claiming these shares as his, but postponing his decision whether he would be registered himself or have some nominee registered as transferee. Thereupon the other directors excluded the plaintiff from the board on the ground that he had become disqualified. Subsequently a transfer of 100 other shares in the plaintiff's favour was executed and lodged with the company for registration. Although the trustee had not raised any objection to registration, the directors refused to register the transfer:—

Held, (1.) that the plaintiff had ceased to hold the 1000 shares "in his own right," and was not entitled to an injunction to restrain his exclusion from the board; (2.) that he was entitled to have the register of members rectified by the insertion of his name therein as holder of the second 100 shares.

The words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under 1 & 2 Vict. c. 110, s. 14, have different meanings.

The English and Colonial Produce Company, Limited, was incorporated on November 9, 1901.

The following clauses were contained in its articles of association:—

"35. Any person becoming entitled to a share in consequence

of the death or bankruptcy of any member may, upon producing such evidence of title as the directors shall require, and subject as hereinafter provided, either be registered himself as holder of the share or elect to have some person nominated by him registered as the transferee thereof."

"103. . . . . The first directors of the company shall be . . . . Joseph Sutton [and four other persons]."

"104. A director must be a member of the company. The qualification of a director shall be the holding in his own right alone, and not jointly with any other person, 100 shares of 1*l.* each or 100*l.* stock, and this qualification shall be required as well of the first directors as of all future directors."

"116. The office of a director shall be vacated . . . . (*d*) if he cease to hold the qualifying number of shares or amount of stock."

Joseph Sutton was, and on April 25, 1902, continued to be, the registered holder of 1000 shares in the company numbered 6001 to 7000, both inclusive.

On April 25, 1902, Sutton was excluded from the board of directors upon the ground that he had become disqualified.

In 1888 he had been adjudicated a bankrupt, and he was never discharged. On April 14, 1902, the trustee in bankruptcy as the official receiver in bankruptcy, and as such being the trustee in bankruptcy of Sutton, gave the following notice to the secretary of the company: "I hereby give you notice and require you to place my name upon the register of your company in respect of the 1000 ordinary shares numbered 6001 to 7000, both inclusive, now standing on such register in the name of the said Joseph Sutton," and threatened proceedings, in default, to enforce the entry of his name.

On April 16 the trustee sent the company a telegram withdrawing the notice.

On the same day he sent a letter to the secretary in which, after referring to the telegram, he wrote, "I mean by this, that though I claim the shares as property which is vested in me by law, I will not ask for the actual transfer for a few days; but I shall be very much obliged if you could supply me by return of post with a list of the names and addresses of the

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shareholders, as I purpose to offer the shares for sale to the shareholders."

On April 28, 1902, a transfer in favour of Sutton of 100 shares, numbered 5901 to 6000, was executed and lodged for registration. It came before the board of directors on May 1. The directors refused to register it upon the ground that, if they registered it, the trustee in bankruptcy of Sutton would be entitled to take the shares.

In the present action Sutton moved for an interlocutory injunction to restrain the company, and H. M. Sternberg and F. Church, two of its directors, from further interfering with or preventing the plaintiff from acting as a director of the company, and also that the register of members of the company might be rectified by inserting the plaintiff's name therein as the holder of the 100 shares. The motion was heard on May 29, 1902.

Hansell and *Macklin*, for the plaintiff. The plaintiff is the holder of the required number of qualification shares "in his own right." It may be that when his trustee in bankruptcy intervenes the plaintiff may cease so to hold the shares: *Cohen* v. *Mitchell* (1); *Herbert* v. *Sayer*. (2) In the meantime beneficial ownership is not necessary to constitute a holding in the plaintiff's own right: *Pulbrook* v. *Richmond Consolidated Mining Co.* (3) The decision of Jessel M.R. in that case is good law, notwithstanding what was said by Cotton L.J. in *Bainbridge* v. *Smith* (4), in which Lindley L.J. said he was not prepared to dissent from the decision of Jessel M.R. Lord Herschell in *Cooper* v. *Griffin* (5) said it would be dangerous to interfere with the decision, and it was followed in *Howard* v. *Sadler*. (6)

The plaintiff is, therefore, entitled to an injunction from being excluded from the directorate.

As regards the 100 shares transferred to the plaintiff, he is entitled to be registered as the holder of them. The fact that

(1) (1890) 25 Q. B. D. 262.
(2) (1844) 5 Q. B. 965.
(3) (1878) 9 Ch. D. 610.
(4) (1889) 41 Ch. D. 462, 471.
(5) [1892] 1 Q. B. 740, 751.
(6) [1893] 1 Q. B. 1.

he is a bankrupt is no answer to his claim for rectification of the register. The registration will not affect the title of the trustee to take the shares as after-acquired property of the bankrupt: *In re Roberts.* (1)

H. Terrell, K.C., and *J. D. Israel*, for the defendants. When the trustee claimed to be entitled to the 1000 shares the plaintiff ceased to hold those shares in his own right, and became disqualified to act as a director of the company. *Bainbridge* v. *Smith* (2) shews that some effect must be given to the words "in his own right." They mean that it is not sufficient that the shares should be held by the member in a representative character—not merely as the representative or nominee of another person. According to Lindley L.J. in that case, the shares must be held by a person in such a way that the company can safely deal with the holder in respect of his shares, whatever his interest may be. The words in *Pulbrook* v. *Richmond Consolidated Mining Co.* (3) were "registered member in his own right." The plaintiff, having lost his qualification shares, was rightly excluded from the board, and his claim to an injunction fails.

As regards the 100 shares transferred to the plaintiff, s. 50, sub-s. 5, of the Bankruptcy Act, 1883, provides that "where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee." The company, therefore, could not recognise the title of the plaintiff to be registered in respect of these shares.

Hansell, in reply.

Cur. adv. vult.

June 5. BUCKLEY J. (after stating the facts). The effect of what the trustee did, in my opinion, was that he claimed the 1000 shares as his, but postponed for a few days his decision as to whether under art. 35 he would require to be registered himself or elect to have some person nominated by him registered as transferee. Under these circumstances the question is whether,

(1) [1900] 1 Q. B. 122. (2) 41 Ch. D. 462, 471.
(3) 9 Ch. D. 610.

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after April 14 and 16, 1902, the bankrupt continued to hold "in his own right" these 1000 shares. In *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) Jessel M.R. held that a man may hold as registered member in his own right, notwithstanding that he has not the beneficial ownership of shares. Looking at what was said by Lindley L.J. in *Bainbridge* v. *Smith* (2), by Lord Herschell in *Cooper* v. *Griffin* (3), and by Lord Coleridge C.J. and Wills J. in *Howard* v. *Sadler* (4), I think that, notwithstanding what was said by Cotton L.J. in *Bainbridge* v. *Smith* (5), this decision of Jessel M.R. cannot now be treated as open to question. It is true, as has been pointed out in some of the subsequent cases, that Pulbrook, in the case before Jessel M.R., was beneficial owner subject to a mortgage, and that therefore the decision might be supported upon a different ground. But the ground upon which the Master of the Rolls put it, and which is supported by the later cases, is that the words "holding in his own right" do not require that the holder shall be beneficial owner.

Negatively, then, the holder in his own right need not be beneficial owner. It remains to say what, affirmatively, he must be. That, I think, is answered by Lindley L.J. in *Bainbridge* v. *Smith*. (6) He must be a person who holds shares in such a way that the company can safely deal with him in respect of his shares, whatever his interest may be in the shares. Holding in a representative character will not do. Holding as trustee without beneficial ownership will do, but the holder must so hold as that the company can safely deal with him as owner. Turning, then, to the facts of this case, after April 14 and 16, 1902, could this company have safely dealt with the plaintiff in respect of the shares? I think not. The company had received notice from the trustee that he claimed the shares, and that he postponed for a few days stating in which way he would, under art. 35, avail himself of his rights of ownership. After that the company could not have safely dealt with the plaintiff in disregard of the claims of

(1) 9 Ch. D. 610.
(2) 41 Ch. D. 462, 474.
(3) [1892] 1 Q. B. 740, 750.
(4) [1893] 1 Q. B. 1.
(5) 41 Ch. D. 462, 472.
(6) Ibid. 475.

the trustee. In my judgment, therefore, the plaintiff (although he had a beneficial interest in case his estate proved to be solvent) was not on April 25 the holder in his own right of the 1000 shares. He had become disqualified, and his office of director was vacated.

Subsequently, namely, on April 28, a transfer in his favour of 100 shares was executed and lodged for registration. It came before the board on May 1. The directors refused to register it, and the ground upon which they rely is that, if they had registered it, the trustee in bankruptcy would have been entitled to take the shares. This is not, I think, in the mouth of the company, any answer to a demand for registration of the transfer. It is an effectual transfer. The trustee had not raised, and I see no reason why he should raise, any objection to its registration. The right of the trustee to the shares is in no way defeated, but, on the contrary, is assisted by the company taking the shares out of the name of the transferor and putting them into the name of the transferee. Seeing, however, that the plaintiff had previously become disqualified as a director, and his office had fallen vacant, his subsequent registration as the holder of these 100 shares will not re-establish him in his office.

So far, therefore, as the notice of motion asks an injunction to restrain the defendants from excluding the plaintiff from acting as director, it fails, and I dismiss it. So far as it asks for rectification by inserting the plaintiff's name as the holder of the 100 shares, numbered 5901 to 6000, it succeeds, and I make an order for rectification. I make no order as to costs.

To complete the review of the cases relating to holding "in his own right," I may add that the words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under 1 & 2 Vict. c. 110, s. 14, have not the same meaning. The language of 1 & 2 Vict. c. 110, s. 14, is, "standing in his name in his own right or in the name of any person in trust for him." The juxtaposition of these words shews that the shares to be charged are to be shares in which the judgment debtor has a beneficial interest. The same shares, therefore, may be held by the judgment

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debtor "in his own right" for purposes of qualification, but not so as to render them available for the purpose of a charging order. This was the decision in *Cooper* v. *Griffin* (1) and *Howard* v. *Sadler*. (2)

Solicitors for plaintiff: *Churchman & Winser.*
Solicitors for defendants: *Dyson, Smith & Marchant.*

F. E.

JOYCE J.
1902
May 13, 16.

SWEET *v.* BISHOP OF ELY.

[1902 S. 1261.]

Ecclesiastical Law—Offences by Clergymen—Deprivation—Separation Order by Court of Summary Jurisdiction—Persistent Cruelty—Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *s.* 1, *sub-s.* 1 (*d*), (*e*)—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5, 12.

The Clergy Discipline Act, 1892, s. 1, sub-s. 1, directs that, if either (*d*) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (*e*) a separation order is made against a clergyman under the Matrimonial Causes Act, 1878, any preferment held by him shall be declared by the bishop to be vacant. By the Matrimonial Causes Act, 1878, a separation order could be obtained by a married woman against her husband upon the ground of his conviction for an aggravated assault upon her within the Offences against the Person Act, 1861. This provision was repealed by the Summary Jurisdiction (Married Women) Act, 1895; but s. 4 of that Act enabled a married woman whose husband had been convicted of an aggravated assault upon her under the Offences against the Person Act, 1861, or (among other things) had been guilty of persistent cruelty to her, to obtain from a Court of summary jurisdiction a separation order against him, and s. 5 provided that the separation order while in force should have the effect in all respects of a decree of judicial separation on the ground of cruelty. A separation order having been made against a vicar under this Act on the ground of his persistent cruelty, the bishop declared the vicarage vacant under the Clergy Discipline Act, 1892:—

Held, that the declaration could not be supported under clause (*e*), because the provision in the Act of 1895 enabling a married woman to obtain a separation order on the ground of persistent cruelty was not a re-enactment with modification within s. 38, sub-s. 1, of the Interpretation Act, 1889, of the repealed provision in the Act of 1878, so as to require

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(1) [1892] 1 Q. B. 740. (2) [1893] 1 Q. B. 1.

the bishop to treat the separation order as a separation order under the Act of 1878; nor under clause (*d*), because a separation order under the Act of 1895 was not an order for judicial separation in a divorce or matrimonial cause.

MOTION.

On February 16, 1891, the Rev. Algernon Sidney Osborn Sweet, the plaintiff in the action, was inducted and instituted to the vicarage of Cowlinge, in the diocese of Ely, on the presentation of the Master, Fellows, and Scholars of Trinity Hall, Cambridge, the patrons of the living.

On January 28, 1902, the plaintiff's wife applied to the justices sitting in petty sessions at Newmarket for a separation order against the plaintiff under the Summary Jurisdiction (Married Women) Act, 1895, on the ground of his persistent cruelty, and an order was made in the following terms:—

"Alice Mary Sweet, wife of Algernon Sidney Osborn Sweet, hereinafter called the defendant, having made a complaint that the defendant has been guilty of persistent cruelty to her his said wife, and by such cruelty has caused her to leave, and live separately and apart from, him, and the defendant having appeared: it is this day ordered and adjudged that the said Alice Mary Sweet be no longer bound to cohabit with her husband." Then the legal custody of the infant children of the marriage was given to the wife while they were under the age of sixteen years; and the husband was ordered to pay to his wife the sum of 1*l.* a week until the order was varied or discharged, and the costs of the application.

On February 21, 1902, the Bishop of Ely caused a notice to be sent to the plaintiff under the Clergy Discipline Act, 1892, which recited that a separation order had been made against the plaintiff under the Summary Jurisdiction (Married Women) Act, 1895, "which Act revoked and re-enacted with modifications the fourth section of the Matrimonial Causes Act, 1878," and that the order had become conclusive within the meaning of the Clergy Discipline Act, 1892, and gave notice of the bishop's intention to declare the preferment of Cowlinge vacant at the time and place therein mentioned; and on March 7, 1902, the bishop declared the living vacant accordingly.

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On April 15, 1902, the plaintiff commenced this action against the bishop, the churchwardens of the parish, and the patrons of the living, to have it declared that the declaration made by the bishop on March 7, 1902, was unauthorized and void, and for an injunction to restrain the defendants from interfering with the plaintiff in the enjoyment of his preferment and the possession of the church and vicarage, and from instituting any other person into the said preferment, or from in any way acting upon the declaration of March 7, 1902; and he now moved for an injunction in the terms of the writ.

The validity of the declaration of vacancy turned upon the construction of the following enactments. Sect. 1, sub-s. 1, of the Clergy Discipline Act, 1892, provides that, "if either . . . . (*c*) a clergyman is found in a divorce or matrimonial cause to have committed adultery, or (*d*) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (*e*) a separation order is made against a clergyman under the Matrimonial Causes Act, 1878; then, after the date at which the . . . . order or finding becomes conclusive, the preferment (if any) held by him shall, within twenty-one days, without further trial be declared by the bishop to be vacant as from the said date, and he shall be incapable, save as in this Act mentioned, of holding preferment."

The only section in the Matrimonial Causes Act, 1878, under which a separation order could be made, was s. 4, which provided that, if a husband should be convicted summarily or otherwise of an aggravated assault within the meaning of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 43, upon his wife, the Court or magistrate before whom he should be so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should be no longer bound to cohabit with her husband; "and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty."

This section was repealed by s. 12 of the Summary Jurisdiction (Married Women) Act, 1895; but s. 4 of that Act provides that "any married woman whose husband shall have been

convicted summarily of an aggravated assault upon her within the meaning of section forty-three of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her" (of the character therein mentioned) . . . . "or whose husband shall have been guilty of persistent cruelty to her . . . . and shall by such cruelty . . . . have caused her to leave and live separately and apart from him, may apply to any Court of summary jurisdiction acting within the city, borough, petty sessional or other division or district, in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act"; and the section contained a proviso which enabled a married woman, applying on the ground of her husband's conviction upon indictment, to apply to the Court before whom her husband was convicted, and provided that that Court should for the purposes of the section become a Court of summary jurisdiction. Sect. 5 provides as follows: "The Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—(*a*) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)." Then followed provisions as to the custody of the children, the payment of alimony, and the payment of the costs of the application.

Sect 38, sub-s. 1, of the Interpretation Act, 1889, provides: "Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

E. Clayton, for the plaintiff. The bishop has exceeded his powers. By s. 1, sub-s. 1 (*e*), of the Clergy Discipline Act, 1892, the bishop is directed to declare a living vacant where a separation order has been made against the incumbent under the

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Matrimonial Causes Act, 1878; but the only ground upon which a separation order could be made under that Act (see s. 4) was that the husband had been convicted of an aggravated assault within the Offences against the Person Act, 1861. That section was repealed by the Summary Jurisdiction (Married Women) Act, 1895 (s. 12), and s. 4 of that Act provides that a separation order may be made where the husband has been convicted of an aggravated assault under the Offences against the Person Act, 1861, or of certain other assaults of a serious character, and also where the husband has been guilty of persistent cruelty. The bishop has proceeded upon the view that that section is a re-enactment with modification of s. 4 of the Matrimonial Causes Act, 1878, within s. 38, sub-s. 1, of the Interpretation Act, 1889, and consequently that the reference in the Clergy Discipline Act, 1892, to the Matrimonial Causes Act, 1878, must be treated as a reference to s. 4 of the Act of 1895. The provision in the Act of 1895 which relates to assaults by the husband on the wife is no doubt in substance a re-enactment of the earlier section; but the provision which relates to persistent cruelty cannot be a re-enactment of anything, because nothing of the kind had ever been enacted before. Whereas by clause (*e*) of sub-s. 1 of s. 1 of the Clergy Discipline Act, 1892, the bishop may declare a living vacant where a separation order has been made against an incumbent who has been convicted of a serious crime, he has now declared the living vacant in a case where the incumbent has been guilty of no crime at all, but of persistent cruelty only. By clause (*d*) of the same sub-section the bishop may also declare a living vacant where an order is made against the incumbent for judicial separation in a divorce or matrimonial cause; but this separation order was not made in a divorce or matrimonial cause, and the bishop has not proceeded under that clause. This declaration is therefore void.

Dibdin, K.C., and *G. J. Talbot*, for the bishop and churchwardens. Sect. 4 of the Act of 1895, taken as a whole, is a re-enactment with modifications of the repealed provision in the Matrimonial Causes Act, 1878, as to obtaining a separation order. It is not open to the plaintiff to split up the section

and say that one part is a re-enactment and that another part is not.

But, further, the declaration may be justified under clause (*d*) of sub-s. 1 of s. 1 of the Clergy Discipline Act, 1892. By s. 5 of the Act of 1895, a separation order made under that Act is to have the effect in all respects of a decree of judicial separation on the ground of cruelty, and one of the effects of a decree of judicial separation made against a clergyman is that he is so deprived of his preferment under the Clergy Discipline Act, 1892. The Act of 1895 merely provides cheaper machinery for obtaining a judicial separation on the ground of cruelty, and it cannot be that the right to deprive a clergyman of his preferment depends upon the question whether his wife applies to the magistrate or to the Divorce Court. The difference is simply one of procedure. The notice of February 21, 1902, does not preclude the bishop from proceeding under clause (*d*), and it was quite right in not specifying under which clause the bishop was proceeding, since the Clergy Discipline Rules, 1892, do not require that the notice shall be in any particular form: see rule 25. Rule 96 directs that the forms in the Appendix shall be used so far as applicable, and the form relating to this matter is form 35. But that form merely gives an indication of what the bishop has to do, and is not exactly applicable to the present case, since it was framed before the passing of the Act of 1895. The reference in the notice to the Act of 1878 is mere surplusage. This declaration is therefore good under clause (*d*).

Even supposing that the bishop has made a mistake in law, it is to be observed that the Clergy Discipline Act gives no discretion to the bishop as to declaring the living vacant, and this point ought to be taken into consideration upon the question of costs.

J. Pawley Bate, for the patrons of the living.

Clayton, in reply. It is not open to the bishop to give up clause (*e*) and proceed upon clause (*d*). Form 35 shews that a separate form is applicable where the bishop proceeds on clause (*d*).

But, apart from that objection, this is not an order for

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judicial separation in a divorce or matrimonial cause. If the bishop's contention is right, clause (*e*) would have been unnecessary, because s. 4 of the Matrimonial Causes Act, 1878, provides that a separation order made under that Act "shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty," and therefore a separation order under that Act would have fallen under clause (*d*). Those words are even stronger than the words in the Act of 1895. It is said that because the Act of 1895 gives to a separation order made thereunder while in force the effect of a decree of judicial separation, therefore it is a decree of judicial separation in a divorce or matrimonial cause; but, first, these provisions in the Acts of 1878 and 1895 meant that the wife was to be in a position of a feme sole as to property and contracts, and were not intended to refer to the provisions of the Clergy Discipline Act; and, secondly, the application to the magistrate for a separation order was not a divorce or matrimonial cause; in fact, it was not a cause at all, but a summary proceeding. The Legislature does not say that the separation order is to be the same thing as a decree of judicial separation, and the two things are kept distinct in the Clergy Discipline Act itself; moreover, that Act is a penal Act and must be construed strictly.

A somewhat similar point arose under the Bankruptcy Act, 1883, where the question was whether an order which was final and had the same effect as a final judgment could be treated as if it were a final judgment under the Act so as to enable a creditor to found a bankruptcy notice upon it, and it was held that the term "final judgment" in the Bankruptcy Act had its strict and technical meaning: *Ex parte Chinery* (1); *In re Binstead.* (2) Those cases apply by analogy.

Cur. adv. vult.

May 16. JOYCE J., after stating the facts and referring to the several enactments above set out, continued as follows:— The separation order was made against the plaintiff under the Summary Jurisdiction (Married Women) Act, not upon the

(1) (1884) 12 Q. B. D. 342. (2) [1893] 1 Q. B. 199.

ground of conviction for an aggravated assault, but upon the ground of persistent cruelty. It should be observed that the Matrimonial Causes Act, 1878, does not authorize a separation order to be made upon the additional or alternative ground of persistent cruelty which was introduced by the Act of 1895; but only upon the ground of conviction for an aggravated assault.

The bishop was advised that by virtue of the 38th section of the Interpretation Act, 1889, the reference in the Clergy Discipline Act of 1892 to the Matrimonial Causes Act, 1878, must now be construed and treated as a reference to the Summary Jurisdiction (Married Women) Act of 1895, so as to require the bishop for the purposes of the Clergy Discipline Act of 1892 to treat the separation order in the present case just as if it had been a separation order under the Matrimonial Causes Act, 1878; and accordingly his Lordship has proceeded to declare the preferment of the plaintiff, that is the vicarage of Cowlinge, to be vacant, and hence the present action.

In my opinion the view of the law which the bishop and his advisers have adopted and acted upon cannot be maintained. Indeed, it was not very strongly supported before me by the counsel for the defendants. I cannot regard the provision in the Act of 1895, which authorizes the making of a separation order on the ground of persistent cruelty, to be a re-enactment with modification of the provision in s. 4 of the Act of 1878, enabling a separation order to be made upon the ground of conviction for an aggravated assault. The main contention on behalf of the bishop was that the separation order in the present case was an order for judicial separation against a clergyman in a divorce or matrimonial cause within s. 1, sub-s. 1 (*d*), of the Clergy Discipline Act, 1892.

Now, it is quite true that by s. 5 of the Summary Jurisdiction Act of 1895 it is enacted that the provision in a separation order under that Act that the applicant shall be no longer bound to cohabit with her husband shall, while in force, have the effect in all respects of a decree of judicial separation on the ground of cruelty; still, it is not an order for judicial separation; and, at all events, such an order by justices is not in my

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opinion an order for judicial separation made in a divorce or matrimonial cause, the jurisdiction in respect of which is now vested in one of the Divisions of the High Court. Indeed, I do not think that the proceedings before the justices under the Summary Jurisdiction Act of 1895 are a cause at all. If the separation order here could be correctly described as an order for judicial separation in a matrimonial cause, a fortiori would this have been the case with a separation order under s. 4 of the Matrimonial Causes Act, 1878. But if that had been the view of the Legislature, clause (*e*) of sub-s. 1 of s. 1 of the Act of 1892 would have been wholly unnecessary.

These statutory enactments which direct a bishop to declare the preferment of any clergyman—however disreputable—to be vacant must no doubt be construed strictly; and under the circumstances I find myself compelled to hold that the declaration made by the bishop in the present case was not authorized and is invalid, and there must be a declaration to that effect, with liberty to apply for an injunction. The order will provide that no proceedings shall be taken thereunder for three weeks, in order to preserve the status quo in case the bishop may desire to appeal.

With regard to the costs of the action. It appears to me that the Act required the bishop to declare this preferment vacant, if he was right in his view of the law. In my opinion it is very lamentable if the law is as I have been compelled to decide it to be, and I think that the bishop has fallen into a very pardonable error, if it be an error. It seems to me that this is a case in which each party should bear his own costs.

Solicitors: *Ruston, Clark & Ruston, for A. H. & A. Ruston, Newmarket; Lee, Bolton & Lee; Cole & Jackson, for Francis, Francis & Collin, Cambridge.*

H. B. H.

PRYCE-JONES *v.* WILLIAMS.

JOYCE J.

1902

May 28; *June* 13.

[1900 P. 1465.]

Vendor and Purchaser—Lease—Title—Outstanding Legal Estate in Crown—Condition limiting Time for sending in Requisitions—Waiver of Objection—Objection as to Root of Title.

In 1884 two leases were granted to a company from which the present vendors derived title. In the same year the company went into liquidation for the purposes of reconstruction, and sold all its assets, including the leases, to a new company of the same name; but there was no formal assignment of the leases, and the old company was shortly afterwards dissolved. In 1901 these leases were sold by order of the Court, subject to conditions which limited the time for sending in requisitions and objections to title. After the prescribed period the purchaser objected that the vendors had shewn no legal title to the leases. The lessor had received rent from the new company and its successors in title from 1884 until the present time, and the vendors offered to procure the consent of the lessor to the assignment of the leases to the purchaser:—

Held, that the purchaser was precluded by the conditions from insisting upon his objection as to the outstanding legal estate (which had become vested in the Crown as bona vacantia), inasmuch as the objection related, not to the root of the title, but to the subsequent devolution thereof.

Certain leasehold property, consisting of a mineral estate known as the "Van Lead Mines," together with the manager's house and a number of workmen's cottages, was by order of the Court put up for sale by auction in three lots, lot 1 comprising the mine, lot 2 the cottages, and lot 3 the manager's house. The property was not sold at the auction, but on September 30, 1901, a conditional contract was entered into for the sale of the property to John Henry Roscoe at the price of 3100*l.*, and he paid a deposit of 310*l.* to the vendors. By this contract the property was to be sold subject to the particulars and conditions of sale so far as the same were applicable to a sale by private contract. This contract was approved by the Court on October 9, 1901. The present litigation had reference to certain objections to the title of lots 2 and 3.

The history of the property was as follows: The whole of the property was originally held by a company registered in 1869 under the name of the Van Mining Company, Limited,

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under leases from Lady Londonderry. The mine was held under a lease dated March 10, 1882; but in 1894 this lease was surrendered and a new lease was granted to the present vendors, and no question arose as to this. The cottages and the manager's residence were respectively held under two leases dated April 23, 1884, the former for a term of sixty years from Lady Day, 1876, at a ground rent of 9*l.* per annum; the latter for a like term of sixty years from Lady Day, 1874, at a ground rent of 5*l.* per annum, and they were so described in the particulars of sale. In August, 1884, the Van Mining Company went into liquidation for the purpose of reconstruction, and a new company of the same name was formed and took over the whole of the assets of the old company, but no formal assignment of the leases was ever made. The old company was dissolved shortly after the sale of its undertaking. In 1891 the second Van Mining Company also went into liquidation for the purposes of reconstruction, and a new company of the same name was formed and took over the assets of the second company, and again there was no formal assignment. In 1892 the third Van Mining Company went into liquidation, and the liquidator sold the property now in question to the present plaintiffs (who had entered into a partnership to work the mine), and a formal assignment from the company and its liquidator, dated July 4, 1892, was duly executed. In 1900 this action was commenced for a dissolution of the partnership, and by the judgment in the action, dated January 19, 1901, the partnership was dissolved and the property was directed to be sold.

Clause 6 of the conditions of sale provided for the delivery of the abstract within a certain time after the approval of the contract by the Court, and it concluded as follows: "And each purchaser is within fourteen days after the actual delivery of the abstract to deliver at the office of Edward Powell, solicitor, at Newtown, in the county of Montgomery, a statement in writing of his objections and requisitions (if any) to and on the title as deduced by such abstract, and upon the expiration of such last-mentioned time, and in this respect time is to be deemed of the essence of the contract, the title is to be con-

sidered as approved of and accepted by such purchaser, subject only to such objections and requisitions, if any."

Clause 17 provided as follows: "Each purchaser shall assume that all the proceedings in the winding-up of the Van Mining Company, Limited, registered in 1869, and in the winding-up of the Van Mining Company, Limited, registered in 1884, and in the winding-up of the Van Mining Company, Limited, registered in 1891, were perfectly regular, and shall not make any objection or requisition in respect of such respective windings-up, or require any evidence in relation thereto or in respect thereof."

The abstract of title was delivered on October 21, 1901. No objections or requisitions were delivered by the purchaser within the time prescribed by the conditions of sale; but on November 9, 1901, the purchaser delivered certain requisitions whereby he asked that the assignments of the leases of the cottages and manager's residence to the companies of 1884 and 1891 should be abstracted and produced. It was ultimately elicited from the vendors that no such assignments had ever been executed; and the purchaser then objected that no legal title had been shewn to these premises. The replies to these requisitions were given without prejudice to the purchaser's time for sending in requisitions having expired. On December 16, 1901, the vendors took out a summons in this action asking that the purchaser might be ordered to pay the balance of the purchase-money into court to the credit of the action, and that he might thereupon be let into possession, and that all proper directions for the conveyance of the premises to him might be given.

On March 19, 1902, the purchaser took out a summons for rescission of the contract and a return of the deposit.

The vendors' summons was heard first.

R. J. Parker, for the vendors. The requisitions have been delivered out of time, and the title must be deemed to be accepted. There being no formal assignment by the company of 1869 to the company of 1884, the legal estate did not pass to the latter company. There was again no assignment by the company of 1884 to the company of 1891; but that is not

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material, since the company of 1884 never had the legal estate to convey. Objection is taken as to this outstanding legal estate. Either the legal estate is vested in the Crown as bona vacantia or it has reverted to the lessor. If the legal estate is in the Crown the purchaser is in no danger. It is true that there is no jurisdiction to enforce a trust against the Crown; but the Court has always dealt with the beneficial interest apart from the interest of the Crown, and the Crown has always recognised equitable interests: *Hodge* v. *Attorney-General* (1); *Attorney-General for Trinidad and Tobago* v. *Bourne*. (2)

If the legal estate is in the lessor the purchaser is equally in no danger, since the lessor, by having received rent from the first company's successors ever since 1884, is estopped from impeaching the vendors' title; but assuming that the receipt of rent alone would not be sufficient to create an estoppel, the vendors are willing to obtain the consent of the lessor to the assignment of these leases to the purchaser. As regards strangers, the Statute of Limitations is an answer. This is a merely technical objection, and is covered by the condition as to time.

Dunham, for the purchaser. The vendors have made no title to that which they have agreed to sell. They agree to sell two valuable leaseholds, not an equitable interest. No perfect abstract has ever been delivered. The abstract purports to be an abstract of leaseholds and the leases are abstracted without the assignments, and after repeated requisitions the vendors admit that there are no assignments. Condition 6 does not apply to a vendor who has no title having regard to what he has contracted to sell: *Want* v. *Stallibrass* (3); *In re Tanqueray-Willaume and Landau*. (4) It is not for the purchaser to say where the legal estate is. Suppose it were necessary to enforce the lessor's covenants the purchaser could not do so, because there is no privity of contract and no privity of estate. No case can be found in which the Court has forced an equitable

(1) (1839) 3 Y. & C. Ex. 342; 51 R. R. 380.
(2) [1895] A. C. 83.
(3) (1873) L. R. 8 Ex. 175.
(4) (1882) 20 Ch. D. 465.

title on a purchaser where he has contracted to buy a legal title.

Parker, in reply, referred to *Walsh* v. *Lonsdale*. (1)

JOYCE J. said that he would take time to consider his judgment upon this summons, and postponed the hearing of the second summons until after he had given judgment.

June 13. JOYCE J., after stating the facts relating to the several mining companies, and referring to clauses 6 and 17 of the conditions of sale, and observing that there were no special conditions with respect to lots 2 and 3, continued as follows:— Upon the formation of the second company in 1884, although the property of the old company had been sold to the new, there had been no actual assignment of the two leases comprised in lots 2 and 3, and consequently the present vendors had really only an equitable interest in these leases, the legal estate being outstanding, and I have no doubt outstanding in the Crown. The property not having been purchased at the auction, Mr. Roscoe subsequently purchased it subject to the particulars and conditions of sale, so far as the same were applicable to a sale by private contract. An abstract of title was delivered, and what it shewed was that the vendors had only an equitable title, and that the legal estate was outstanding. Then requisitions were delivered, but not in time. They were delivered beyond the period expressly limited by clause 6 of the conditions of sale. The other clause to which I referred (clause 17) is not material to the present case, except as shewing that there had been three companies incorporated, and that those three companies had been wound up.

With reference to the abstract of title that was delivered, I do not think it was very seriously contended before me that that abstract was imperfect; indeed, it appears to me to have been the most perfect abstract the vendors could furnish at the time of its delivery; and, that being so, the abstract is not imperfect or insufficient because it shews a defective title, or

(1) (1882) 21 Ch. D. 9.

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even no title at all. Now, the requisitions that were made with reference to the legal estate in those two leases were not as to the root of title, but as to the subsequent devolution. I come to the conclusion that those requisitions cannot be insisted upon, the vendors standing, as they do, upon condition 6, which stipulates that the requisitions must be made within a limited time. On consideration I see no reason why, in this case, the purchaser is not bound by the fact that his requisitions were not sent in in time. The purchaser will obtain possession of the property, and he will get a perfectly good equitable title, and he cannot be disturbed; and he will, no doubt, obtain the legal estate upon application to the proper quarter and upon payment of certain recognised fees, although I admit that the Crown could not be compelled to assign the legal estate.

In that state of things, an order must be made on the vendors' summons. I do not think that this is a case for costs. I think the persons who prepared these conditions of sale ought to have known, if they did not know, the particular circumstances of the case, and ought to have provided for them by a special condition. Therefore, the vendors will have no costs. It follows from what I have said that the purchaser's summons must be dismissed; but it will be dismissed without costs. The order must be made upon the vendors undertaking (as they offer) to procure the consent in writing of the lessor to the assignment to the purchaser of the property comprised in these leases for the residue of the term.

Solicitors: *Busk, Mellor & Norris, for E. Powell, Newtown; Vallance, Birkbeck & Barnard.*

H. B. H.

SAVILL BROTHERS, LIMITED *v.* BETHELL.

[1900 S. 2563.]

C. A. 1901 BUCKLEY J. *April* 23, 24. C. A. 1902 *May* 8, 9, 15.

Real Estate—Conveyance—Grant—Common Law Assurance—Statute of Uses (27 *Hen.* 8, *c.* 10), *s.* 1—*Exception—Uncertainty—Election—Limitation of Estate of Freehold to commence in futuro—Validity.*

A freehold estate was conveyed by a vendor unto and to the use of the purchaser in fee simple, "except and reserving unto the vendor a piece of land not less than forty feet in width commencing at the point A marked on the plan" to the conveyance "and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from" other lands of the vendor. The exact position of the piece of land so excepted was not in any way defined either by boundaries or colour so as to distinguish it from the rest of the land described in the conveyance and plan. Subsequently the purchaser (who had bought the estate for building purposes) prepared a road plan shewing a strip of land forty feet in width as the site for a road extending from the point A on the plan to the conveyance to an intended road, also shewn on the road plan and afterwards completed, and which was the "nearest road" to the point A. This was said to operate as an election by the purchaser defining the "forty feet" piece and so making the uncertain exception certain:—

Held, that the "forty feet" piece so said to have been defined had not been effectually excepted from the conveyance, (1.) because the conveyance operated at common law and not under the Statute of Uses, so that the exception, being in the nature of a limitation of an estate of freehold to commence in futuro, was bad; and (2.) because, even if the conveyance could be held to operate under the Statute of Uses, the exception was bad as infringing the rule against perpetuities, since any election necessary to give effect to the exception might not be made, according to the terms of the conveyance, until after the "nearest road" had been made by the purchaser or his assignee, an event not necessarily occurring within the period prescribed by the rule.

Where there is a grant by deed with an exception out of it, the exception is to be taken as inserted for the benefit of the grantor and to be construed in favour of the grantee.

Whether an uncertainty in a grant or exception can be made good by election, *quære*.

Decision of Buckley J. affirmed.

PRIOR to a conveyance of March 23, 1896, hereinafter mentioned, certain lands situate both on the east and the west sides of the Tottenham and Forest Gate Railway were vested in the trustees of one Charles Bartholomew, who had contracted with

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one William Lyon to sell to him part of the land on the west side of the railway. Subsequently to that contract Lyon entered into two other contracts, one for the sale by him of one portion of the land he had so agreed to purchase to one William Onslow Times, and the other for the sale of another portion to the plaintiffs, Savill Brothers, Limited, brewers.

By the conveyance of March 23, 1896, which was made between the Bartholomew trustees (therein called "the vendors") of the first part, William Lyon of the second part, and William Onslow Times of the third part, after recitals of the three contracts, the vendors, by the direction of Lyon, conveyed to Times the property comprised in the latter's contract by the following description: "All and singular the lands and hereditaments with the dimensions and abuttals thereof more particularly described in the first schedule hereto and the plan annexed hereto, together with the rights of way in the said first schedule and with the exceptions and reservations therein set forth," to hold the same unto and to the use of W. O. Times in fee simple. And Times for himself, his heirs, executors, administrators, and assigns, to the intent to bind not only himself personally, but also all persons claiming title under him to the hereditaments thereto conveyed or any part thereof, and to bind such hereditaments into whosesoever hands the same should come, thereby covenanted with Lyon, his executors, administrators, and assigns, and the owner for the time being of the adjoining hereditaments coloured pink on the said plan (being the land which Lyon had agreed to sell to the plaintiffs), that the trade of an innkeeper, victualler, or seller of wines, spirits or beer, to be consumed either on or off the premises, or a club where such liquors were consumed, should not be carried on upon any part of the said hereditaments thereby conveyed.

The first schedule to the conveyance was, so far as is material, in the following terms: "All that piece or parcel of land coloured blue in the plan drawn hereon containing thirty-seven acres or thereabouts situate in the parishes of Little Ilford and East Ham in the county of Essex, being part of a larger piece of land agreed to be sold by the vendors to the said William

Lyon, which said larger piece of land contains in the whole sixty-seven acres or thereabouts, more or less, save and except and reserving unto the vendors a piece of land not less than forty feet in width commencing at the level crossing over the railway at the point marked 'A' on the said plan and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from the lands of the vendors lying on the east side of the Tottenham and Forest Gate Railway curve shewn on the said plan." The schedule also contained reservations to the vendors and Lyon of rights of way over all roads then existing or which might be made by Times, or those claiming under him, on any of the lands conveyed, together with a right of way for Times, and those claiming under him, over roads which might be made by the vendors, or those claiming under them, on their lands lying on the east side of the Tottenham and Forest Gate Railway curve, and which could be approached by means of the level crossing shewn on the plan, and over such level crossing.

The land described in the schedule as "a piece of land not less than forty feet in width," was not identified or distinguished in any way on the plan by boundaries or by a separate colour, but was simply coloured blue with the rest of the thirty-seven acres.

By an indenture dated March 26, 1896, Lyon conveyed to the plaintiffs, Savill Brothers, Limited, in fee simple, the piece of land coloured pink on the plan referred to in the conveyance of March 23, with the benefit of Times' covenant contained in the conveyance of March 23 restrictive of the user of the hereditaments coloured blue on the plan to that conveyance, and the right, at the cost of Savill Brothers, Limited, to enforce the performance or observance of the same covenant.

On the piece of land so conveyed to them the plaintiffs, Savill Brothers, Limited, built an off-licensed public-house called the "Browning Arms."

The property comprised in the conveyance of March 23, 1896, was bought by Times for building purposes, and shortly afterwards he commenced laying out roads upon it in accordance with a road plan prepared by him. Upon this plan there

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was marked out a strip of land (being part of the land coloured blue on the plan to the conveyance of March 23, 1896) as the site of an intended road forty feet wide commencing from the level crossing at the point A mentioned in the schedule to the conveyance, and terminating at an intended crescent road also marked out on the same road plan, and afterwards called "Shakespeare Crescent," running nearly parallel with the railway curve at a distance of about 150 feet therefrom. The plan shewed that this crescent road was, with the exception of the forty-feet road, the "nearest road" to the point A. It was not proved that Times' plan, or any other road plan, or any building plan purporting to fix the position of the "forty feet" piece referred to in the conveyance of March 23, 1896, was in existence at the date of that conveyance, and, so far as appeared, Times was under no obligation to construct any of the roads. The road on the "forty feet" strip between A and the crescent road was commenced by Times in 1897 at the end of the strip next the crescent road; but afterwards, in the same year, the work, which had been carried but a short distance from its starting-point, was discontinued and never completed, no road to the railway level crossing being required, in consequence of the railway company having bought up the land on the other or east side of the level crossing. The other roads on the road plan, including the road afterwards called "Shakespeare Crescent," were all completed by Times by December 3, 1897.

In 1898 the defendant Alfred Bethell, who had at the time notice of the conveyance of March 23, 1896, and of the covenant therein contained, purported to purchase from the Bartholomew trustees the "forty feet" strip, and on part of it he proposed to erect a public-house. Whereupon the plaintiffs, Savill Brothers, Limited, and W. O. Times, commenced this action against him, contending that the "forty feet" strip was included in the conveyance to Times of March 23, 1896, and claiming an injunction to restrain the defendant from using the strip in breach of the covenant contained in that conveyance, and a declaration that the whole of the land described in that conveyance as "coloured blue" on the plan

therein referred to passed by the same conveyance and became vested in the plaintiff Times for an estate in fee simple.

This was the trial of the action. The action came on for hearing before Buckley J. on April 23, 1901.

G. I. F. C.

Neville, K.C., and *H. M. Humphry*, for the plaintiffs. The covenant not to build a public-house runs with this land which passed by the conveyance, and the defendant is bound by it. It was never intended that the strip should be free from the covenant. But the excepted strip does not belong to the defendant. The exception is invalid altogether. It is not a reservation, but an exception, and it is void for uncertainty. It is impossible to shew what part is excepted: Sheppard's Touchstone, 7th ed. p. 78. It is also void under the rule against perpetuities. Therefore the exception fails, and the whole estate passed to Times: *Pearce* v. *Watts* (1); *Cooper* v. *Stuart* (2); *London and South Western Ry. Co.* v. *Gomm.* (3)

H. Terrell, K.C., and *J. W. Manning*, for the defendant. The defendant does not take this piece of land under the conveyance; it was expressly excepted from it, and it is not affected by the covenant. The exception is not void; the uncertainty has been cured by the subsequent acts of the vendors; they have completed the estate and laid down the roads, so that the boundaries of the excepted land are now fixed. An uncertain exception can in this way be made good under the maxim "Id certum est quod certum reddi potest": Fry on Specific Performance, 3rd ed. p. 157. That refers to uncertainties in contracts, but the same principle applies to conveyances: No. 101 (1561) Moore's Reports, 31. Uncertainty at the date of the grant may be made certain by subsequent election: Viner's Abridgment, tit. "Grants," vol. xiv. p. 49; Bacon's Abridgment, 7th ed. tit. "Grants," vol. iv. p. 81; 2 Coke, 36, 37; *Sir W. Hungerford's Case* (4); *Sir Thomas Lee's Case* (5); *Doe* v. *Wilson.* (6) The exception is good as a shifting use to arise when the roads are

(1) (1875) L. R. 20 Eq. 492.
(2) (1889) 14 App. Cas. 286, 289.
(3) (1882) 20 Ch. D. 562.
(4) (1585) 1 Leon. 30.
(5) (1578) 1 Leon. 268.
(6) (1855) 10 Moo. P. C. 502.

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made by the purchaser in the same way as the exception in *Cooper* v. *Stuart* (1) was supported as a defeasance. It is immaterial that the motive of the exception was to reserve a right of way, not a right of building; it was clearly intended to reserve the legal estate.

But we contend that the whole estate did not pass under the conveyance. If this strip of land was excepted, the whole did not pass; and if the exception is void for uncertainty, the grant is also uncertain and void. The statement to the contrary in *Pearce* v. *Watts* (2) is only a dictum; it is not supported by authority, and is inconsistent with *Cooper* v. *Stuart*. (1) The defendants have acquiesced in our using this strip in this way, and cannot complain now: *Sayers* v. *Collyer*. (3)

Neville, K.C., in reply. This is an exception: Sheppard's Touchstone, 7th ed. p. 79. It is not a shifting use, for it is not under the Statute of Uses. Authorities on leases do not apply, for there is no difficulty in granting a lease to commence at a future time, and an estate of freehold cannot be granted to commence at a future time, except after the determination of a precedent estate: Challis on Real Property, 2nd ed. pp. 92, 93. In order to make a grant valid the election must take place within the lifetime of the contracting parties, and there is no such limit here: Bacon's Abridgment, 7th ed. tit. "Grants," vol. iv. p. 81.

BUCKLEY J. stated the facts, and continued:—One thing is obvious, namely, that the intention of the parties to the deed of March 23, 1896, was to reserve a piece of land for the purpose of access, and not for the purpose of building anything upon it; and it was never intended that anything that was reserved should become the site of a public-house, or should not be governed by the covenant as to the trade of an innkeeper. It does not follow, of course, having regard to what has taken place, that they have achieved their intention. The question which I have to determine is, What are the legal rights of the parties?

(1) 14 App. Cas. 286, 289. (2) L. R. 20 Eq. 492.
(3) (1884) 28 Ch. D. 103.

The question wholly turns on this in my view. The deed of March 23, 1896, recites the covenant not to carry on this trade upon any part of the "hereditaments intended to be hereby conveyed"; and the covenant is that the trade shall not be carried on upon any part of the said "hereditaments hereby conveyed." The question, therefore, is whether there is excepted from the deed, so that it is not thereby conveyed, the piece of land upon which Bethell is now erecting a public-house.

It is said that in this case the exception is void upon two grounds. First, that it is uncertain because one cannot tell what is excepted; and, secondly, that it infringes the rule as to perpetuities. Let me point out in what respects the exception is uncertain. In the first place, that which is excepted is a thing of no definite width; it is a piece of land not less than forty feet in width. Secondly, it is a piece of land of no definite length; its length depends upon something to happen in the future, namely, the distance at which Times, or his assignees, shall make the nearest road. If he made his nearest road 40 feet off, the excepted piece would be 40, or something exceeding 40 feet in width by 40 feet in length; if it was 120 feet off it would be 40 feet by 120 feet, and so on according to any other distance one might take. If, on the other hand, Times made his nearest road along the railway, or extended his nearest road so that it finished at the railway, the piece of land would be of no size at all, so that, except with reference to future events, I do not find a piece of land indicated either by length or by breadth. Further, it appears to me that even if the length and breadth were ascertained its situation is necessarily indeterminate. Supposing that Times laid out his road nearest to the point A in a crescent whose centre was at A, then the road might lie along any one of the radii of that circle. So that neither in length nor in breadth nor in situation is the piece of land definitely fixed.

That being so, it has been argued on the part of the defendant that there may be a grant of something uncertain at its date, which can be rendered certain by a subsequent election. Authorities have been referred to, which I agree are difficult

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to deal with, which seem to point to the possibility of such a state of things; but looking at all of those cases as summed up in Sheppard's Touchstone, 7th ed.—and they are all old cases—I find what is ultimately stated there at p. 79 is this: "If the exception be set down uncertainly, as if one grant a house, excepting one chamber; or grant a manor, excepting one acre; but doth not set forth which chamber, or which acre it shall be, these exceptions are void"—that is for uncertainty. Then follows this: "However, query, for there are authorities to the contrary, namely, that the exception may be available by election."

In that state of the law I think I am entitled to guide myself by some more recent authorities, and in the first place I will refer to a passage in Lord Watson's judgment in the case of *Cooper* v. *Stuart* (1), where, delivering the judgment of the Privy Council, his Lordship said this: "An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it and remain with himself. A valid exception operates immediately, and the subject of it does not pass to the grantee." I cannot read that sentence as consistent with the view that there can be an exception which does not operate immediately, because until a subsequent event you cannot ascertain either the dimensions or the situation of the thing excepted. In other words, I read that as not being consistent with the view of the law that it may by subsequent election be determined what is properly the subject of an exception.

Then, secondly, I refer to what I agree is but a dictum; but it is a dictum of a very great judge, namely, Sir G. Jessel in the case of *Pearce* v. *Watts*. (2) The case which the Master of the Rolls had to deal with was this; the matter lay in contract, and an action was brought for specific performance of the contract, and the contract was one under which the vendor reserved the necessary land for making a railway through the estate to Prince Town. The actual decision was that that reservation was so uncertain that specific performance

(1) 14 App. Cas. 289. (2) L. R. 20 Eq. 492, 493.

could not be ordered; but the Master of the Rolls puts this case: Supposing this contract had been carried out by a conveyance in the same form, what would have been the result? Now, that is exactly the case which I have to deal with here. The Master of the Rolls says: "The present contract is one which cannot be carried out by conveyance; and that being so, I do not see how the Court can alter it and make a new contract which can be carried out by conveyance. By the contract the vendor agrees to sell certain land, but 'reserves the necessary land for making a railway through the estate to Prince Town.' If the conveyance were executed in this form" (and it appears to me that that is the case which I have to do with here, because the conveyance is executed in this form), "it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for uncertainty." It seems to me that that is the case here. There is an exception here which is void for uncertainty for the reasons which I have indicated, and under those circumstances it appears to me that the whole passes, and the exception is void.

Further, it is argued that the exception is void, because it is an infringement of the rule against perpetuities, inasmuch as there is no time limited by this deed within which the purchaser is to determine where this road is to be made. It is common ground that the determination of this excepted or reserved piece of land is dependent upon that. Inasmuch, therefore, as the thing which is excepted may not be ascertained within the time limited by the rule as to perpetuities, then, according to the well-known case of the *London and South Western Ry. Co.* v. *Gomm* (1), it must fail on that ground. As regards the exact form of the grant itself, I have been pressed with this. It has been said that I may treat it, as in the case of *Cooper* v. *Stuart* (2), as being not a true exception, but a reservation in the sense that it may be treated as a defeasance or shifting use, as a grant to Times, the grantee, until the road is selected, and then to the vendors. It appears to me I cannot treat it in that way. In *Cooper* v. *Stuart* (2) the word was "reserving,"

(1) 20 Ch. D. 562. (2) 14 App. Cas. 286.

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and in this case the words are "save and except and reserving." The difference is well known between the two. An exception is a taking out, a subtraction from, that which has been previously expressed to be granted of some part of the thing granted. A reservation must be of some new thing out of that which is granted. Here both words are used—"save and except and reserving." I must, therefore, treat this as being an exception from the thing which is granted.

I ought to add that I have been asked to determine another question that might arise between the parties, namely, whether any effect could be given to this clause by way of reserving an easement to the vendors of a right of way over the land which has been granted to the purchaser. On that I say nothing at all. Even if it did take that form, the soil would equally pass to the purchaser and would be bound by the covenant. It seems to me, therefore, that here the exception fails, and that the covenant prevails.

Then there is another point on which I ought to say a word, and that is this. The defendant has put in evidence the plan which Times, the purchaser, prepared, shewing the scheme under which he was going to lay out the roads upon his land, and there has been called a witness, who was the contractor employed to make the roads upon the land, and he says this was the plan on which he was employed. Now, I find, in point of fact, on looking at the plan, that at the place in question, at the point "A" there is laid out a thing which is coloured yellow just as all the other intended roads on the estate are coloured yellow, and on that plan there is throughout indicated the line of the kerb of the footpath in such a position that it appears to me that, if the case is to be determined on that evidence, the plan indicates that the purchaser had laid out his nearest road so that it extended up to the point A. If so, even if there was a valid exception, there was nothing excepted, because he extended the road up to the point A. If that were so, it seems to me equally on that ground the defendant would fail.

Under these circumstances, I must hold that the covenant in question extends to this piece of land, and that the plaintiffs

are entitled to an injunction in the terms of the covenant to restrain the defendant from carrying on the trade of an innkeeper on this piece of land.

H. C. R.

The defendant appealed.

The appeal was heard on May 8 and 9, 1902.

H. Terrell, K.C., and *J. W. Manning*, for the defendant. Although at the date of the conveyance of March 23, 1896, the position of the excepted "forty feet" piece or strip was uncertain, yet its position became subsequently defined by the act of Times, the purchaser under that conveyance. That act operated as an "election," and so made the exception effectual. In the case of a conveyance by feoffment, it seems that an uncertain exception is bad altogether, but where the conveyance is by grant, the exception may be made good by election. Where there is an uncertainty as to an exception from property conveyed or agreed to be conveyed, then, so long as the matter rests in agreement only, it is the grantor who has the right of election; but, after actual conveyance, it is the grantee who has the right: *Sir Walter Hungerford's Case* (1); *Sir Thomas Lee's Case* (2); Vin. Abr. tit. "Election," A pl. 2, B pl. 11, C pl. 10, 12; Sheppard's Touchstone, 7th ed. pp. 77–8; *Jenkins* v. *Green* (3), which latter case shews that the right must be exercised reasonably. In such a case as this the exception may be made perfectly good by subsequent election notwithstanding that at the date of the conveyance it may have been impossible to fix the excepted plot by metes and bounds. If the exception was bad, then the whole grant was rendered uncertain and nothing passed by the deed; but to arrive at a certainty as to what passed by a conveyance the acts of the parties may be regarded: *Doe* v. *Wilson*. (4) *Pearce* v. *Watts* (5) was a case of reservation—which was held void for uncertainty—and the dictum of Jessel M.R. had reference to a reservation and not to an exception; the distinction between

(1) 1 Leon. 30.
(2) 1 Leon. 268.
(3) (1858) 27 Beav. 437.
(4) 10 Moo. P. C. 502, 511, 524, 526.
(5) L. R. 20 Eq. 492.

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the two is explained in *Cooper* v. *Stuart*. (1) The moment it is definitely ascertained what property was intended to pass by a conveyance, it passes as from the date of the conveyance. It is impossible to hold, looking at the language of the schedule to this conveyance, that the intention was that the whole thirty-seven acres should pass to the purchaser and that the vendors should retain nothing. The question is one of intention. We submit that the forty feet strip did not pass and was not intended to pass by the conveyance; if so, the restrictive covenant in the deed did not apply to this strip, and was not intended to do so.

[STIRLING L.J. Is not the exception void for remoteness within *London and South Western Ry. Co.* v. *Gomm*? (2)]

We submit not. There the option of the purchaser was not destructible by the grantee without the concurrence of the grantors (3); whereas here the option was destructible at any time by the purchaser alone. Having defined the forty feet strip by making Shakespeare Crescent as the "nearest road" to the point A, the purchaser made his election; by that election he was bound once for all, and he cannot exercise his election afresh.

Neville, K.C., and *H. M. Humphry*, for the plaintiffs. An exception from a grant, in order to be valid, must be certain and must also take effect at once—that is, at the time of the grant: *Cooper* v. *Stuart*. (1) The Court is being asked to go beyond the old cases, for in each of them the piece of land in question, though uncertain as to its position, was definite in quantity, the election merely having the effect of localising the piece. But here the quantity is altogether indefinite. The conveyance operates at common law and not under the Statute of Uses, so that no legal estate can pass in land that is not defined. The doctrine of shifting uses cannot be applied to an uncertain exception such as this so as to shift a legal estate at will from one person to another. An "exception" from a grant must be of part of the thing granted, of a thing in esse at the time of the grant: it is distinct from a "reserva-

(1) 14 App. Cas. 286, 289, 290. (2) 20 Ch. D. 562, 580.
(3) 20 Ch. D. 581-2.

tion," which must be of some new thing issuing out of the thing granted: thus, there may be an "exception" of a house or a close of land comprised in the property granted, while a "reservation" may be of a rent or right of way: Davidson's Conveyancing Precedents, 4th ed. vol. i. p. 96. So that the subject of an "exception" never passes out of the grantor at all, whereas a "reservation" is a regrant to the grantor, the whole property passing in the first instance to the grantee by virtue of the conveyance. That was treated as undoubted, according to the then "present law," by Jessel M.R. in *Pearce* v. *Watts*. (1) Possibly, though the point is treated by Preston, in Sheppard's Touchstone, 7th ed. p. 79, as doubtful, an exception that is uncertain may be made certain by election; but, according to *Pearce* v. *Watts* (1), a reservation that is uncertain is void ab initio. The doctrine of election is attempted to be defined in Termes de la Ley, p. 286: but so far from the doctrine being settled, we find that, according to *Sir W. Hungerford's Case* (2), the grantor is the person to elect, whereas in *Sir T. Lee's Case* (3) it is the grantee. We submit that this so-called "exception" is not really an exception at all, but a "reservation" operating by way of regrant: *Duke of Sutherland* v. *Heathcote*. (4) It is not a reservation in the technical sense, but it is a reservation in the sense used by the Privy Council in *Cooper* v. *Stuart* (5)—that is, it operates as a "defeasance," and not as an exception: it looks to the future, and possibly to a remote future, or it may never come into operation at all. If so, it is void as infringing the rule against perpetuities: *London and South Western Ry. Co.* v. *Gomm* (6); *Cooper* v. *Stuart*. (5) And it is also void for uncertainty: *Pearce* v. *Watts*. (1) But upon the facts, we submit that the conveyance should be read as containing no reservation at all. A strip of land, undefined, was wanted for the purpose of making a road which, it appeared, might be required for necessary access to and over the level crossing. It turned out that no road was wanted, and therefore any reservation of land

(1) L. R. 20 Eq. 492, 493.
(2) 1 Leon. 30.
(3) 1 Leon. 268.
(4) [1892] 1 Ch. 475.
(5) 14 App. Cas. 286, 290.
(6) 20 Ch. D. 562.

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became unnecessary. The result is that there is no reservation at all of any part of the thirty-seven acres comprised in the conveyance; the whole passed, and the restrictive covenant attaches to the whole, including the forty feet strip.

H. Terrell, K.C., in reply. I submit that effect should be given to what was the obvious intention of the parties at the date of the conveyance. The intention was to give access to the vendors' land on the other or east side of the railway, and the parties did not contemplate the possibility of that access never being required. The same rule applies to a grant as to an exception, namely, that it must be certain; and, in either case, what is uncertain may be made certain by election: *Sir W. Hungerford's Case* (1); *Sir T. Lee's Case* (2): both of which cases are cited as good law in Vin. Abr., and other books of that kind; and there are no authorities to the contrary. The principle is that an uncertain exception is only void if it cannot be made certain by some matter ex post facto: Sheppard's Touchstone, 7th ed. p. 250. In *Cooper* v. *Stuart* (3) the principle discussed was that of repugnancy, and not uncertainty. It is suggested that this exception should be construed as a defeasance, and so void under the rule against perpetuities; but I submit that the whole deed should be construed so as to give effect to the intention of the parties. The rule against perpetuities, which is defined in Sanders on Uses, 5th ed. p. 203, and Lewis on Perpetuities, p. 164, both referred to in *London and South Western Ry. Co.* v. *Gomm* (4), has no application to an "exception," for it is not a "creation of a future estate or interest": it is really a grant by negative words.

[COZENS-HARDY L.J. In Co. Litt. 145 a it is stated that "when an estate or interest passes immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors."]

That does not mean that in such a case as the present the election must have been made at any time within the limits of perpetuity.

(1) 1 Leon. 30.
(2) 1 Leon. 268.
(3) 14 App. Cas. 286.
(4) 20 Ch. D. 574, 581.

[STIRLING L.J. In Vin. Abr. tit. "Election," A 2, pl. 5, it is said that "when election creates the interest nothing passes till election, so where no election can be, no interest can arise."]

No doubt election is required to pass the interest, but it does not "create" the interest, for that is already in the person having the right of election.

Duke of Sutherland v. *Heathcote* (1) is really in my favour, for if the appointors under the deed in that case had been owners in fee, it seems that the reservation of the licence to work minerals would have been construed as an "exception" of the minerals.

Again, the restrictive covenant in the conveyance does not bind this strip, for it applies only to "the hereditaments thereby conveyed."

COLLINS M.R. We will take time to consider this case.

Cur. adv. vult.

May 15. The judgment of the Court (Collins M.R., Stirling and Cozens-Hardy L.JJ.) was delivered by

STIRLING L.J., who, after stating the facts, continued:—It was contended on behalf of the plaintiffs that the exception was bad for uncertainty. The answer made by the defendant was that, although at the date of the conveyance of March 23, 1896, the position of the roads on the property conveyed was perfectly uncertain, as also that of the "piece of land not less than forty feet in width" mentioned in the schedule, yet the position of both became subsequently defined by the act of the purchaser, which operated as an election, and so made the exception effectual; and it was also said that, if the exception was bad, the whole grant was rendered uncertain, so that nothing passed by the deed.

The last point may be disposed of at once. It is a settled rule of construction that, where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor, and to be construed in favour of the

(1) [1892] 1 Ch. 475.

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grantee: see Sheppard's Touchstone, 7th ed. p. 100; *Earl of Cardigan* v. *Armitage* (1); *Bullen* v. *Denning*. (2) If, then, the grant be clear, but the exception be so framed as to be bad for uncertainty, it appears to us that, on this principle, the grant is operative and the exception fails. The question, therefore, is whether the exception is good.

It was admitted that if the conveyance had been by some modes of assurance, as, for example, feoffment, the exception would have been bad. A similar point appears to have been decided in the time of Queen Elizabeth with respect to a feoffment which required an election to support it. The case is reported under the name of *Bullock* v. *Burdett* (3), and is thus stated in Vin. Abr. tit. "Election," A, pl. 1: "If A. seised in fee of 100 acres, enfeoffs B. of 18 of the 100 acres (without assigning which of the 100 acres he enfeoffed him of) to hold to B. and his heirs at election of B. and his heirs when he please; this is a void feoffment so that this cannot be made good by any election, because a livery cannot operate in futuro, but ought to pass the freehold presently or never, and therefore the feoffment void."

It was said, however, that the law was otherwise with respect to grants, and in support of this proposition various passages were cited from Sheppard's Touchstone, as well as some decided cases, namely, *Sir W. Hungerford's Case* (4), *Sir T. Lee's Case* (5), and *Jenkins* v. *Green*. (6) Of the passages in the Touchstone, those most favourable to the appellant's contention appear to be the following (which are quoted from Mr. Preston's edition), p. 79: "If the exception be set down uncertainly, as if one grant a house, excepting one chamber; or grant a manor, excepting one acre; but doth not set forth which chamber, or which acre it shall be, these exceptions are void [for uncertainty. However, query, for there are authorities to the contrary, namely, that the exception may be available by election]." Page 250: "If there be tenant

(1) (1823) 2 B. & C. 197; 3 D. & R. 414; 26 R. R. 313.
(2) (1826) 5 B. & C. 842, 850; 8 D. & R. 657; 29 R. R. 431.
(3) (1567) Dyer, 281 a; Moore, 81.
(4) 1 Leon. 30.
(5) 1 Leon. 268.
(6) 27 Beav. 437.

for life of 3 houses, and 4 acres of land, and he in reversion grant the reversion of two [of the] houses and of two [of the] acres of this land; this is a good grant, and hath sufficient certainty in it; [to be rendered complete by election. But election must be made in the lifetime of the grantor and of the grantee]." Page 251: "If one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to I. S.; in this case, if I. S. make his election which acre he will have, the grant of the remainder to him will be good. [As to the point, that it may be made good by election, query; and see supra, 250]."

The comments of the learned editor appear to shew that the law as to making good an uncertainty by election was not regarded by him as completely settled; and in any case the law laid down in the text requires some care in its application.

The force of the phrase, "making good or complete by election," will be understood from the following passage from *Sir Rowland Heyward's Case* (1): "Here is not election to claim one of two several things by one and the same title, but to claim one and the same thing by one of two several titles; for"—and this is the material part—"where the things are several, nothing passes before election, and the election ought to be precedent; but when one and the same thing shall pass, there it passeth presently, and the election of the title may be subsequent; and therefore if I have three horses, and I give you one of my horses, in this case the election ought to be made in the life of the parties, for inasmuch as none of the horses is given in certain, the certainty and thereby the property begins by election."

If, then, by a deed there had been a grant of a plot of land to be ascertained by election, it follows that, until the election, nothing passed; and if the deed granted certain specified lands, with the exception of a plot to be ascertained by election, it seems to us that the deed would at once pass the whole, but subject to an exception which could only be ascertained and take effect when the election was made.

Formerly, a deed of grant was a mode of assurance

(1) (1595) 2 Rep. 35 a, 36 a.

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applicable only to incorporeal hereditaments, including reversions and remainders in land; but by 8 & 9 Vict. c. 106, s. 2, it was enacted that corporeal hereditaments, as regards the conveyance of the immediate freehold thereof, should be deemed to be in grant as well as in livery. The statute, however, in no way alters the rules of law with respect to the creation of estates. It appears to have been suggested in argument in the case of *Boddington* v. *Robinson* (1) that s. 6 of the Act has this effect, but that section deals, not with the creation of new estates, but with the disposition of existing interests in real estate: see Challis on Real Property, 2nd ed. pp. 99, where the question is discussed.

The conveyance of March 23, 1896, is expressed to be to William Onslow Times, to hold "unto and to the use of William Onslow Times in fee simple." A conveyance in such a form as this has been repeatedly held to operate at common law and not under the Statute of Uses: *Jenkins* v. *Young* (2); *Meredith* v. *Joans* (3); *Peacock* v. *Eastland.* (4) See *Orme's Case.* (5) This turns on the language of the statute, which only applies "where any person or persons . . . . shall happen to be seized of and in any . . . . hereditaments to the use, confidence or trust of any other person or persons": 27 Hen. 8, c. 10, s. 1. Now, it has long been settled that, according to the common law, a limitation of an estate of freehold to commence in futuro is void: *Buckler's Case* (6); *Barwick's Case* (7); *Roe* v. *Tranmarr* (8); and see Challis on Real Property, 2nd ed. p. 93. Indeed the case of *Bullock* v. *Burdett* (9), already cited, is an example of the operation of this very rule. If, then (as we think), the conveyance of March 23, 1896, operates at common law, the exception is bad. If, however, it can be held that the conveyance operates under the Statute of Uses, then it appears to us that the exception is equally bad as infringing the rule against perpetuities; for the election, without which the exception is of no effect, need not

(1) (1875) L. R. 10 Ex. 270.
(2) (1630) Cro. Car. 230.
(3) (1630) Cro. Car. 244.
(4) (1870) L. R. 10 Eq. 17.
(5) (1872) L. R. 8 C. P. 281.
(6) (1597) 2 Rep. 55 a.
(7) (1597) 5 Rep. 93 b.
(8) (1758) Willes, 682.
(9) Dyer, 281 a; Moore, 81.

be made, according to the terms of the conveyance, until after the "nearest road" had been made by the purchaser or his assignee—an event which would not necessarily occur within the period prescribed by the rule. It was contended that, according to the law as stated in Sheppard's Touchstone, the election must be made in the lifetime of both grantor and grantee; but the answer is that, although this might be so if the deed had been silent on the subject, the parties have chosen to determine otherwise. On this part of the case the reasoning of Sir George Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm* (1) appears to be in point.

This conclusion is not in conflict with any of the cases cited for the appellant, and is in accordance with the opinion expressed by Sir George Jessel M.R. in *Pearce* v. *Watts.* (2) There, speaking of a contract by which a vendor agreed to sell certain land, but reserved "the necessary land for making a railway through the estate to Prince Town," he says (3): "If the conveyance were executed in this form, it is obvious, according to the present law, that the whole land would pass to the purchaser, the reservation being void for uncertainty."

In our opinion, therefore, the plot of land as to which the question arises was not effectually excepted from the conveyance made by the deed of March 23, 1896; and, as the covenant sought to be enforced in this action extends to all the lands thereby conveyed, the appellant's case fails. We do not thereby decide that effect cannot in some other way be given to the intention, which is plain on the face of the deed, that the vendors should be entitled to access from their lands on the east side of the railway to the roads which the purchaser proposed to make on the west side.

The appeal will be dismissed with costs.

Solicitors: *A. M. M. Forbes; Sandilands & Co.*

(1) 20 Ch. D. 562, 580. (2) L. R. 20 Eq. 492.
(3) L. R. 20 Eq. 493.

G. I. F. C.

C. A.
1902
July 2.

In re WOOD.
WOOD *v.* WOOD.

[1901 W. 1782.]

Will—Construction—Illegitimate Children—Gift to Children Nominatim—Gift to Next of Kin of Children under the Statute of Distributions.

A testator gave a legacy to each of his seven children by name, and directed that, in the events which happened, his residuary estate should be held upon trust for such of his seven children thereinbefore named as should be then living and should attain twenty-one; and he directed his trustees to retain the legacy and the share of residue which any daughter might take under the will, and to hold the same upon trust to pay the income to the daughter for life, and then to her husband for life if she should so appoint, and subject thereto in trust for her children, and in default of children in trust for the persons who at the death of such daughter would have been entitled to such share under the Statutes of Distribution in case she had died possessed thereof without having been married. Three of the children were borne to the testator by his wife before her marriage:—

Held, reversing the decision of Kekewich J., that the share of an illegitimate married daughter, who died without having exercised her power of appointment in favour of her husband and without having had any issue, passed to those who would have been her next of kin if she and the testator's other children had all been legitimate.

In re Standley's Estate, (1868) L. R. 5 Eq. 303, overruled.

THIS was an appeal from a decision of Kekewich J. (1)

The testator by his will dated May 12, 1883, bequeathed a pecuniary legacy to each of his seven children by name, and he directed his trustees to stand possessed of his residuary estate after the death of his wife in trust in equal shares for such of his seven children thereinbefore named as should be then living, or should have attained or should attain the age of twenty-one years. And the testator directed his trustees to retain the legacy and the share of his residuary trust estate which any daughter of his might take under the provisions thereinbefore contained, and to hold the same upon trust to pay the income of each such daughter's legacy and share to her during her life for her separate use, and from and after her death, in case she should leave a husband surviving her, upon

(1) [1901] 2 Ch. 578.

trust to pay the income to the husband for life or any less period if she should so direct or appoint, and subject thereto in trust for her children as therein mentioned; and the will continued as follows: "And if there shall be no such child, then in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married, such persons taking as tenants in common in the shares in which they would have taken under such statutes."

The testator died in December, 1883.

Shortly after the testator's death it was ascertained from his widow that three of the testator's children, two daughters and a son, were borne by her to him before her marriage.

The testator's widow died in December, 1900, leaving six of the seven children her surviving.

The testator's daughter Rosalind, who was one of the three illegitimate children, died in January, 1901, leaving a husband surviving her, but without having had any issue. She never in any way exercised her power of appointment under the will in favour of her husband.

This summons was taken out by the testator's youngest child, who represented the natural relations of the daughter, to determine whether the legacy and share of residue bequeathed by the testator for the benefit of his said daughter devolved upon her death without issue upon the persons who would have been her next of kin at the time of her death in case she and the other persons described in the will as the testator's children had all been legitimate, or passed to her legal personal representative as if the same had been absolutely bequeathed to her, or became divisible amongst the persons entitled in right of the testator's widow and legitimate children as if he had died intestate in relation thereto.

Kekewich J. held, following *In re Standley's Estate* (1), that the property did not pass to the daughter's natural relations, but passed to her husband as her legal personal representative.

The plaintiff appealed.

(1) L. R. 5 Eq. 303.

C. A. 1902 WOOD, *In re.* WOOD *v.* WOOD.

Warrington, K.C., and *Lyttelton Chubb*, for the plaintiff. This case falls within both the principles enunciated by Lord Cairns in *Hill* v. *Crook*. (1) He says that there are two classes of cases in which the primary signification of the term "children" will be departed from—(1.) where it is impossible from the circumstances of the parties that any legitimate children can take under the bequest; (2.) where the testator has used the word "children" or other words of relationship in an artificial sense, so that his will is taken as a dictionary to ascertain the meaning of the terms there employed. Here, in the first place, the gift to the daughter's next of kin under the statute, if construed in its strict legal sense, can have no effect in the case of the testator's illegitimate children, because the gift is only to take effect in the event of the daughter having no children; and, secondly, the testator by his will has named his daughter as his child, shewing thereby that he is using the word "child" not in its legal, but in its natural sense. For the purposes of construction, he says that his daughter is to be treated as legitimate, and unless that is carried to its natural conclusion the intention of the testator will be defeated. The reference to the statute creates no difficulty. The question under the statute is who are the kindred; and this will must be construed as if the testator had set out the words of the statute. "Kindred," like "children," is a term which it is perfectly open to the testator to use in an artificial sense. In *In re Deakin* (2) a gift by a testator to his wife's relations, the wife being illegitimate, was held to include natural relations, since otherwise the gift could have had no effect, and *In re Standley's Estate* (3) was dissented from. The decision in *In re Deakin* (2) proceeded upon the first of the two principles stated by Lord Cairns, there being there no context in the will to assist the construction. Kekewich J. has gone wrong, as Wood V.-C. went wrong in *In re Standley's Estate* (3), because he has not treated this question as a question of construction. Upon the question of construction the learned judge was in favour of the appellant, but he thought that effect could not be

(1) (1873) L. R. 6 H. L. 265, 282, 283, 285.

(2) [1894] 3 Ch. 565.

(3) L. R. 5 Eq. 303.

given to the testator's intention. That this question ought to be treated as a question of construction is shewn by Lord Halsbury in *In re Jodrell* (1), and so treated there can be no doubt that the testator intended to draw no distinction in the gifts to his children and their next of kin, whether they were legitimate or illegitimate. That intention appears with sufficient clearness to enable the Court to give effect to it: *Wilkinson* v. *Adam* (2), as explained by Lord Chelmsford in *Hill* v. *Crook*. (3)

Renshaw, K.C. (*F. Thompson* with him), for persons entitled on an intestacy, and *P. O. Lawrence, K.C.* (*Peterson* with him), for the daughter's legal personal representative. The gift over is to persons entitled under the Statute of Distributions, and they are to take in the shares in which they would have taken under the statute. Under this gift no one can take unless he can shew a title under the statute: *Mortimer* v. *Slater* (4); *Bullock* v. *Downes*. (5) But in the case of illegitimate children who die childless, no one can possibly derive title under the statute. The appellant is seeking to constitute an artificial class of persons who are not persons entitled under the statute. The appellant's construction involves striking out the double reference to the statute and inserting a long parenthesis—"If my daughter and my other children had all been legitimate." The children take as personæ designatæ; but, except by pure guesswork, there is no indication in the will that the testator intended that the brothers and sisters of illegitimate children should take as their next of kin. If a daughter died childless, the testator was content that the law should take its course. In *In re Standley's Estate* (6) the Vice-Chancellor thought that effect must be given to the words of the statute. The decision in *In re Deakin* (7) is not inconsistent with that.

Warrington, K.C., in reply.

(1) (1890) 44 Ch. D. 590, 605; [1891] A. C. 304.

(2) (1813) 1 V. & B. 422, 466; 12 R. R. 255.

(3) L. R. 6 H. L. 277.

(4) (1877) 7 Ch. D. 322, 327; affirmed sub nom. *Mortimore* v. *Mortimore*, (1879) 4 App. Cas. 448.

(5) (1860) 9 H. L. C. 1, 28.

(6) L. R. 5 Eq. 303.

(7) [1894] 3 Ch. 565.

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VAUGHAN WILLIAMS L.J. I find that Romer and Stirling L.JJ. take the view that this decision of Kekewich J. cannot be supported. I confess myself that, although the result of my discussion with them has been that I am not prepared to differ from them, I concur with very great hesitation. I entirely agree with Kekewich J. that, if we adopt the construction that we are invited by the appellant to adopt in this case, we are making a distinct step in advance of any that has been heretofore made. I start here with the proposition which is so clearly laid down by Lord Halsbury in *In re Jodrell* (1), that inasmuch as it is lawful for a testator if he chooses to use apt words so to do to give legacies to illegitimate children, and also to the next of kin so-called of illegitimate children, regard must also be had to the intention of the testator, although he may not have used apt words for that purpose—that is to say, although he may have used words which would only be apt in the case of legitimate children or next of kin of legitimate children—if once the Court is satisfied by looking within the four corners of the will, taking into consideration, of course, the surrounding circumstances, that such was his intention. Starting with that, I wait to see whether in the present will the testator has used such words as to make it reasonably clear that he did intend by these words which he has used to give this property after the death of any of his daughters without leaving children to persons who would have been the next of kin of such daughter if she herself and all the testator's other children had been legitimate. It is said that that is so in this case, because this is one of those cases in which the testator has created a dictionary for himself, and that we must read his will in the light of that dictionary. It is said that in the earlier part of the will he speaks of his children illegitimate as well as legitimate by the general term "children." It is said, therefore, that we must read the word "children" as connoting illegitimate as well as legitimate children. I agree. It is said further that in this dictionary which the testator has created we must

(1) 44 Ch. D. 605.

put a still wider connotation on the word "children." It is said that it not only connotes illegitimate as well as legitimate children, but that it means that those people whom he describes as children shall for all purposes be treated as legitimate children, and that when he speaks of the persons who at the death of any daughter would have been entitled to her share under the Statutes of Distribution, in case she had died possessed thereof without having been married, we must read that definition as not really referring to the statute at all, but as if the words used had not been merely "in case she had died possessed thereof without having been married," but had run on, "and in case all my children had been legitimate." I confess myself that I think that is a very material advance. We are invited because of the condition in fact of the testator's family to give to the words of the will a meaning altogether different from and inconsistent with the real words of the will. The real words of the will bind us to refer to the statute as the index to those who are to receive these shares. If we refer to the statute, these particular people who are not next of kin and not within the statute at all could not take. To decide that they can take does seem to me to be going a step further than any case has yet gone; but it is said that we must take that step, because otherwise we defeat the obvious and only possible intention of the testator. It is said that he could not have intended that these words should have no operation, and that under these circumstances we must construe these words in some such way as to give effect to them. I do not know how far that argument is to be carried, and, speaking for myself, I cannot but think that there might be words defining a class with such accuracy and such particularity that it would be impossible to override them upon the ground that, if the words were construed according to their plain meaning, there could never have been a class capable of taking, and that the testator if he was versed in the law must have known that that was so.

It is always possible that the mistake has arisen from the ignorance of the testator of the law, and that he had no sort of intention of using the words in any other sense than their natural sense, because in his mind there was no necessity for his doing

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so. In my opinion, if that was a true description of his frame of mind, it would be impossible to say that he intended to create a dictionary for himself. It is a strong thing to say that, because he intended to create a dictionary for himself in respect of "child," he necessarily intended to create a dictionary for himself in respect of the next of kin of such child. Notwithstanding these considerations, which in my opinion make the question very difficult to decide, I have persuaded myself to concur in the judgments about to be delivered, because it so frequently happens that one is compelled in cases upon the construction of wills to do violence to what one cannot but think is the intention of the testator, and it is rather pleasant in such good company to be able to give effect in this case to what I believe was clearly the intention of the testator. The appeal will therefore be allowed.

ROMER L.J. This is a curious case; but I agree in thinking that this appeal ought to succeed. The testator by his will has with respect to each of his daughters' shares declared that that share shall be held upon certain trusts for the children of the daughter after her death, and, subject to certain trusts for the husband, if the husband survived her, to which I need not refer, in default of children capable of taking under the trusts in their favour, "in trust for the persons who at the death of such daughter would have become entitled to such share under the statutes for the distribution of the personal estates of intestates in case she had died possessed thereof without having been married." Now, to my mind it is clear upon this will that the testator intended that some persons should be capable of taking under that gift over. The question is, What persons? Clearly it could not have been intended to provide in that gift over for any persons who could be ascertained under the statute treating his daughter as illegitimate, because on that footing there could have been no persons capable of taking. On that footing no meaning could have been attached to the gift over. I will not refuse to say that the testator had a meaning in this gift over. I think that he had a meaning, and I ask myself, What meaning? If he did not mean that this daughter should be treated

as illegitimate, has he sufficiently shewn by his will, having regard to the circumstances of his family, what he intended by this gift over? When I ask myself this question, can I doubt who were the persons that he intended to take? No human being can have the slightest doubt what the testator intended; and here I am able to give effect to that intention, and I therefore resolve to do so. The meaning is obvious. He has shewn throughout his will that he intended to treat all his children as legitimate. Then, can I carry out that which the testator intended should be carried out? There can be no question that the gift over is intended to take effect. It is certain that it can take effect if construed on the footing that the seven children were legitimate. On that footing the whole difficulty disappears. I think, therefore, that this appeal ought to succeed.

STIRLING L.J. I am of the same opinion. The testator in certain clauses of the will makes certain bequests to his children, whom he proceeds to name. Of those children three were illegitimate (two of them being daughters) and the others were legitimate. He afterwards divides the residue between his seven children thereinbefore named. Then, by another clause, he settles the share of the residuary estate which any daughter should take upon several trusts for her children and husband not necessary to be mentioned, and ultimately, in default of children, upon the following trusts: [His Lordship read the gift over, and continued:—]

Now, one of the illegitimate daughters has died without children, and the question arises as to the effect of that ultimate gift. The testator, in the clause to which I have already referred, speaks of all these seven persons as his children, and he treats all of them as on the same footing. It follows from that that in the estimation of the testator they have kindred, that they are akin to the testator and akin one to another. In the events which have happened, we are to inquire who would be entitled under the Statute of Distributions (22 & 23 Car. 2, c. 10). What does the statute say with regard to the distribution of the personal estate of a person who has died intestate? The

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statute says that the ordinaries "may make just and equall distribution of what remaineth cleare (after all debts, funeralls and just expences of every sort first allowed and deducted) amongst the wife and children, or childrens children if any such be or otherwise to the next of kindred to the dead person in equall degree." These are the persons who are pointed out by the testator as the objects of his bounty in case the daughter dies without leaving children. In ascertaining who are the next of kindred mentioned in the statute the question is, Who are meant by the testator? Because the testator has simply adopted this reference to the statute as a means of expressing his own dispositions. Are the illegitimate daughters to be treated as having no kindred—no persons who under the statute could succeed to their personal estate? It is plain in the view of the testator that on the death of an illegitimate daughter there might be persons who could succeed and would succeed to her estate. He treats all his children as akin to another; and, in my opinion, the persons intended to take are the next of kin, not on the footing that the illegitimate children are of kin to nobody, but on the footing that they are of kin to those described by the testator as their brothers and sisters. I therefore agree that this appeal must be allowed.

Solicitors: *Indermaur, Clark & Parker; Field, Roscoe & Co.*

H. B. H.

In re WEBSTER AND JONES' CONTRACT.

C. A.
1902
July 17.

[1901 W. 8713.]

Vendor and Purchaser—Sale—Leaseholds—Abstract of Title—"Deducing Title"—Single Document—Lease—Solicitor and Client—Costs—Scale Charge—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order under, Sched. I., Part I.—Practice—Taxation—Vendor and Purchaser Summons, Raising Question of Taxation on—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).

On a sale of leaseholds, the delivery of an abstract of the vendor's title consisting of the lease only is not "deducing title" so as to entitle the vendor's solicitor to the scale charge under Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881.

Wellby v. *Still*, [1894] 3 Ch. 641, followed.

Semble, per Romer L.J.: A question as to the amount of the vendor's costs on a sale is not properly raised upon an ordinary summons under the Vendor and Purchaser Act, 1874, the solicitor not being a party to and therefore not bound by the proceedings. Such a question should be raised on taxation.

By a contract in writing dated June 29, 1901, James Webster and John Webster, who had entered into a contract with Lord Sefton to take a lease for 999 years of a piece of land on the north side of an intended new street in Litherland, in the county of Lancaster, agreed with John Thomas Jones to sell this leasehold land to him, subject to certain conditions whereby the purchaser was to pay the costs of the lessor's solicitors in respect of the lease from Lord Sefton. The vendors were to execute an assignment to the purchaser of all their interest in the land, but the assignment was to be prepared and stamped by and at the expense of the purchaser, who was also to pay all costs, both of the vendors and purchaser and all other parties, of and incidental to the lease or assignment. A further condition was as follows: "The vendors shall within twenty-one days after demand deliver to the purchaser an abstract of their title to the said land commencing with the lease from Lord Sefton, with which the purchaser shall be satisfied. The purchasers shall not be entitled

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to investigate or make any objections or requisitions in respect of Lord Sefton's title."

On October 3, 1901, Lord Sefton granted a lease of the land to the vendors for 999 years at a yearly rent of 14*l.* 4*s.*, calculated at a certain sum per square yard. The vendors' solicitors then produced the lease to the purchaser's solicitor, and delivered to him an abstract of the vendors' title consisting simply of an abstract, four brief pages in length, of the lease itself. The purchaser's solicitor made certain requisitions on the abstract, including a requisition that the licence of the lessor, Lord Sefton, should be obtained to the assignment to the purchaser. These requisitions were duly answered, and on October 10, 1901, an assignment of the lease was executed to the purchaser, the licence having been duly obtained. The vendors' solicitors then sent in to their clients their bill of costs, charging a sum of 23*l.* as their scale fee "for deducing title and perusing and completing assignment." The vendors claimed that this charge should be paid by the purchaser, who, however, objected that the vendors' solicitors had not "deduced title" within the meaning of Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, and were therefore not entitled to charge the scale fee. In consequence of this objection, and also of certain disputes as to the correctness of the calculation of the annual rent payable under the lease, and as to the purchaser's consequent right to compensation or abatement of his purchase-money, the purchaser took out, in the Liverpool District Registry, a summons under the Vendor and Purchaser Act, 1874, for the determination of the several questions in dispute, including the question of the correctness of the scale fee of 23*l.* The case calls for a report upon this latter point only.

The Vice-Chancellor of the County Palatine of Lancaster held, upon the authority of Kekewich J.'s decision in *Wellby* v. *Still* (1), that since the vendors' title consisted simply of one document, namely, the original lease, there had been no "deduction of title" within the General Order under the Solicitors' Remuneration Act, 1881, and accordingly made a

(1) [1894] 3 Ch. 641.

declaration that the vendors were not entitled to charge the scale fee of 23*l.*

The vendors appealed.

The appeal was heard on July 17, 1902.

Norton, K.C., and *Cochran*, for the vendors. The question is whether a solicitor, when he prepares an abstract of the title of his client, the vendor, on a sale to a purchaser, and that title consists of one document only, whether it be an original lease or original conveyance, can be said to be "deducing title." We submit that he can. The question depends upon the meaning of the expression "deducing title" in the scale in Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44): "Vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)."

P. O. Lawrence, K.C. (*Stuart Deacon* with him), for the purchaser, raised the preliminary objection that this was really a question between the vendors and their solicitors, and that the solicitors were not parties to the summons or the appeal.

[ROMER L.J. Technically that is so. The proper time to discuss the question would seem to be on taxation; but I do not think we ought to put the parties to the expense of a further application if we can decide the substantial question now.]

Norton, K.C., and *Cochran.* Our contention is that the vendors' solicitors have done all that is stated in the General Order, namely, "deduced title, and perused and completed conveyance." The abstract they delivered was of the whole title of the vendors. Whether the title consists of one deed only or of many is quite immaterial in considering this question. Supposing a vendor produces as his title a conveyance forty years old, can it be said that he is not "deducing title"? It is a fallacy to say that where one document only is produced there is no deducing of title. The vendor's solicitor, on a sale of leaseholds, deduces title by shewing that he has a lease. It is not sufficient for the lessee to say, "I am lessee"; the purchaser

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requires that statement to be confirmed, and thereupon the lessee's solicitor shews or deduces the title. "Deducing title" is "a drawing forth of the title, shewing the source from which it is derived": *Oakden* v. *Pike*. (1) We submit that whenever you prepare an abstract, even if it be of one document only, you "deduce title," just as you "investigate title," when there is one document only, such as a single Act of Parliament: *Ex parte Mayor of London*. (2) *Wellby* v. *Still* (3), upon which the learned Vice-Chancellor relied, does not apply, because there the purchaser did not take an abstract at all, but only a copy of a lease; you do not "deduce title" by simply handing a copy of a deed: you do so by abstracting your title-deed. If that case decided that a proper title was "deduced," we submit it is wrong and should be overruled; it is, moreover, inconsistent with *Ex parte Mayor of London*. (2)

P. O. Lawrence, K.C., and *Stuart Deacon*, for the purchaser, were not called upon.

VAUGHAN WILLIAMS L.J. (after stating the facts). The question which arises in this case is, Has there in these circumstances been such a deduction of title as to entitle the vendors' solicitors to make a scale charge under the schedule to the General Order under the Solicitors' Remuneration Act, 1881? In my judgment, there has not been such a deduction of title. I agree with the observations which were made by the Vice-Chancellor in his judgment. I do not at all mean to say that the case is an unarguable one. I will assume that there was something to be said on both sides—that it might be reasonably said that the deduction of title is correlative with the investigation of title, and that what is covered by the one is covered by the other, so that there has been a deduction of title, although there is nothing more than the production of this one lease and the delivery of the abstract of it. Be that how it may, this point was raised and clearly decided in the case of *Wellby* v. *Still* (3) by Kekewich J. The headnote of the case correctly states the result of the decision:

(1) (1865) 13 W. R. 673; 34 L. J. (Ch.) 620.
(2) (1887) 34 Ch. D. 452.
(3) [1894] 3 Ch. 641.

"A solicitor to a mortgagor of leaseholds, who simply produces and delivers an abstract of the leases under which the mortgagor holds, has not deduced title within the meaning of Sched. I., Part I., of the General Order under the Solicitors Remuneration Act, 1881, and consequently is not entitled to charge the scale fee." It was attempted by Mr. Norton to differentiate this case by a suggestion that in *Wellby* v. *Still* (1) there was no delivery of the abstract. But it is perfectly plain from the statement of facts, the argument, and the judgment that there was a delivery of the abstract as well as the production of the lease. Now, that case having been decided as long ago as 1894, and there never having been an appeal against the decision, and the question not having apparently been raised in any case since then, it would be, to my mind, very inconvenient, even if we had a doubt as to the correctness of that decision, to interfere with the practice which has now been in force for eight years.

Speaking for myself only, I should like to add that I have not any doubt that there has not been any deduction of title here. Unless some very special and non-natural meaning be given to the word "deducing," it seems to me impossible to say that there has been any "deducing" in this case; and I see no reason why we should give a non-natural meaning to the word.

Under these circumstances, I think the appeal ought to be dismissed, and dismissed with costs.

ROMER L.J. Upon the point now before us I should like, in the first place, to express my doubt, to say the least of it, as to whether it was right or proper to attempt to raise a question of this kind on the amount of the vendor's costs, upon a summons under the Vendor and Purchaser Act. It is extremely inconvenient, because a person who may be affected by the question is a person who is not party to the proceedings, namely, the solicitor to the vendor, and he is a person who cannot, so far as I can see, be bound by the proceedings. Properly speaking, a question of this kind should be raised on taxation. However,

(1) [1894] 3 Ch. 641.

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all parties here are willing to abide by our decision on the point, and therefore I think it better that we should express our opinion upon it.

Now, I think, in dealing with a question of this kind, we are entitled to deal with it as a matter of substance. We are entitled to see whether in substance there has been a "deducing title" within the meaning of the words used in the schedule in question; and, having regard to the circumstances of this case, I do not think there has, in substance, been any "deducing" of title. The facts are that the vendors are lessees who have just obtained the lease they contemplated getting. It is admitted that there have been no dealings by them since they obtained the lease, and it is a case where, under the contract, the title of the lessor could not be investigated.

Can the vendors, under these circumstances, claim to say, as a matter of substance, that the title has been deduced? I do not think so.

Having regard to the decision of Kekewich J. in *Wellby* v. *Still* (1), I think the appeal ought to be dismissed.

STIRLING L.J. I agree. If the matter were res integra, I think that a great deal might be said as to what is the true meaning of the words "deducing title" in the Solicitors' Remuneration Order, and the matter might require careful consideration. But it appears to me that the very point was raised in the year 1894 before Kekewich J., and was decided by him. That decision has now stood for eight years, and, unless there were some strong ground for holding that the decision was incorrect, I think it would be unwise for us to depart from a decision on a point of practice of this kind.

I therefore agree that the appeal must be dismissed with costs.

Solicitors: *Jaques & Co., for Layton, Melly & Layton, Liverpool; Bentley & Jones, for E. D. Symond, Liverpool.*

(1) [1894] 3 Ch. 641.

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[1900 U. 467.]

Easement—Easement of Necessity—Right of Support—Implied Reservation—Severance of two Tenements held by Common Owner—Prescription—Enjoyment Clam—*Right to Support of Side of Dock.*

In 1860 a dock and a wharf to the west of it, and divided from it by a fence, belonged to the same owner. In order to secure the side of the dock, he in that year carried a number of tie-rods under the ground beneath the fence and beneath the surface of the wharf for a distance of about 15½ feet to the west of the fence, the rods being there fastened by nuts to piles which were driven into the soil of the wharf. The tie-rods were not visible; but two nuts on piles were visible on the western side of the camp-sheathing which held up the side of the wharf.

In 1877 the then owners of both properties conveyed the wharf to the plaintiffs, without any express reservation of a right of support for the dock. In 1886 the same owners conveyed the dock to the defendants' predecessors in title. In 1900 the plaintiffs, in making some excavations in the wharf, became for the first time aware of the existence of the tie-rods:—

Held, by Romer and Stirling L.JJ., Vaughan Williams L.J. dissenting, (1.) that, when the wharf was conveyed to the plaintiffs, there was no implied reservation of a right of support to the dock, and that the tie-rods did not remain vested in the grantors as part of or appurtenant to the dock; (2.) that the owners of the dock had not acquired an easement of support by length of enjoyment, the enjoyment having been *clam*, and that consequently the plaintiffs were entitled to remove the tie-rods from their land.

Decision of Cozens-Hardy J., [1901] 2 Ch. 300, affirmed.

Per Vaughan Williams L.J.: The tie-rods formed a corporeal part of the dock, and were reserved with it as appurtenant thereto.

Moreover, the enjoyment of the support was not *clam*, because the plaintiffs had the means of knowledge.

Per Romer L.J.: The easement of support was not one of necessity, and therefore a reservation of it could not be implied.

A prescriptive right to an easement over another man's land can be acquired only when the enjoyment has been open—that is, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of the enjoyment.

Per Stirling L.J.: An easement of necessity is one without which the

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property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property.

It is established by *Dalton* v. *Angus*, (1881) 6 App. Cas. 740, that, in order that an easement may be gained by prescription, it must be proved that the person against whom it is claimed had some knowledge or means of knowledge.

APPEAL from the decision of Cozens-Hardy J. (1)

In 1860 Henry Green was the owner in fee simple of some riverside property at Blackwall. The western part was used as a wharf and shipbuilding yard, and was in the occupation of Messrs. Freeman as tenants. The eastern part was in the occupation of Green himself. In the same year he employed contractors to construct a graving dock on his own premises. It was constructed with timber sides, the underground supports or ties being placed on the eastern side of the boundary fence dividing the two portions of the property. Signs of weakness soon appeared, and, in order to make the dock secure, Green, in or about 1861, under some arrangement with his tenants, Messrs. Freeman, carried rods or ties through the boundary fence under the wharf to a distance of about 15 ft. 6 in., piles being placed there, and the rods or ties being fastened to the piles by nuts. The rods or ties were not visible under the wharf, nor, except to the extent which will be mentioned presently, were the piles or the nuts visible.

In 1877, Green having died, and both the properties being in hand, the devisees under his will conveyed the wharf premises to the plaintiffs, who carried on business there up to the commencement of the present action. The conveyance was in the ordinary form, and contained no express reservation of any right of support to the dock. In 1886 Green's devisees sold the dock premises to a company, which subsequently sold those premises to the defendants, who carried on business there up to the commencement of the action. This conveyance also was in common form, and was silent as to support. In 1892 the defendants concreted the bottom and a small part of the side of their dock; but with this exception the timber remained as before. In 1900 the plaintiffs, in the course of excavations with a view to improving their property, came across a number

(1) [1901] 2 Ch. 300.

of rods and ties, which were those which had been placed there in 1861.

The question in the action was whether the defendants were entitled, as against the plaintiffs, to have their dock supported by means of the rods and ties.

The result of the evidence was thus stated by Cozens-Hardy J. in his judgment:—

"Evidence has been adduced which satisfies me on several points. (1.) For a timber dock of this nature it was reasonably necessary to have underground rods and ties extending beyond the division fence between the two properties. This was proved by actual experience in 1860, and Mr. Jefferey, whose testimony was in no way shaken, states that the proper distance for safety, though it might vary slightly having regard to the nature of the soil, is for a dock of this depth thirty-three feet from the side, and this is about the distance adopted in 1861. (2.) If instead of a timber dock a concrete wall had been placed on the western side of the dock, it would not have been necessary to go beyond the boundary fence. (3.) The plaintiffs, when they purchased in 1877, in fact had no knowledge of the existence of the rods or ties under their land, and they were not aware of their existence until 1900. In saying this I refer to the directors and managers of the plaintiff company. (4.) There are now visible on the western side of the camp-sheathing (1) which holds up the side of the wharf, and a few inches above the slip, two nuts on the outside of piles. These are nuts and piles placed there in 1861. These nuts are not always visible, and are not of such a nature as to attract attention. In fact, the directors and the present manager had not noticed them until 1900. (5.) Although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing and the wharf behind it. (6.) If the plaintiffs remove the ties it is probable that the dock side will give way."

(1) [See note [1901] 2 Ch. at p. 302.]

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The accuracy of this statement was not disputed.

Cozens-Hardy J. held that when the wharf was conveyed to the plaintiffs there was no implied reservation of a right to support to the dock; that the support had been enjoyed *clam*, and that therefore no easement had been acquired by enjoyment; and that the plaintiffs were entitled to remove the rods and ties, although the result might be to cause the defendants' dock to collapse.

The defendants appealed.

Eve, K.C., and *Peterson*, for the defendants. It is submitted that the defendants have acquired an easement for the support of the side of their dock by means of the ties, either by implied reservation in the conveyance to the plaintiffs, or by enjoyment since 1877. The defendants do not complain of any of the six findings of fact stated by Cozens-Hardy J., he having qualified his third finding in the way he has done.

(1.) It is submitted that there was an implied reservation of an easement of support. It is an easement of necessity, and it is therefore an exception from the general rule that a grantor who intends to reserve an easement must do so in express words: *Wheeldon* v. *Burrows* (1); *Nicholas* v. *Chamberlain* (2); *Clark* v. *Cogge* (3); *Palmer* v. *Fletcher* (4); *Suffield* v. *Brown* (5); *Crossley & Sons* v. *Lightowler*. (6) As regards a way of necessity, it is not meant that it must be impossible for the grantor to obtain access to his land by purchasing a right of way over neighbouring land; it is sufficient if the access has always been over the land which is granted; that is a way of necessity rebus sic stantibus: *Ewart* v. *Cochrane* (7); *Pinnington* v. *Galland*. (8) An express reservation by a grantor is treated as a regrant by the grantee.

If the defendants were obliged to expend money in order to preserve the support of their dock, a state of things would be introduced different from that which existed at the time of the conveyance.

(1) (1879) 12 Ch. D. 31, 49, 59.
(2) (1606) Cro. Jac. 121.
(3) (1606) Cro. Jac. 170.
(4) (1663) 1 Lev. 122
(5) (1864) 4 D. J. & S. 185.
(6) (1867) L. R. 2 Ch. 478, 486.
(7) (1861) 7 Jur. (N.S.) 925.
(8) (1853) 9 Ex. 1.

[VAUGHAN WILLIAMS L.J. referred to *Pheysey* v. *Vicary*. (1)]

It could not have been intended to place it in the power of the plaintiffs to destroy the property which was retained by the defendants. The defendants rely upon what was said by James L.J. in *Wheeldon* v. *Burrows* (2)—namely, that in *Nicholas* v. *Chamberlain* (3) "the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house." These tie-rods are an easement or a convenience necessary for the reasonable enjoyment of the defendants' property.

(2.) The defendants have acquired a right to the tie-rods by prescription under the statute or, at any rate, by length of enjoyment. In *Suffield* v. *Brown* (4) the user had been intermittent; in the present case it has been continuous. The plaintiffs' agents who were called to prove that the plaintiffs had no knowledge of the existence of the tie-rods were not persons who were likely to know. The persons likely to know would have been those who were engaged in work about the wharf; not such persons as directors, who paid only occasional visits to it. It is submitted that the plaintiffs had notice, either actual or constructive, of the existence of the tie-rods.

[ROMER L.J. May not the supports be regarded as part of the adjacent land?]

The defendants have to shew that on the severance of two tenements by sale there is not only an implied grant to the purchaser of the one tenement of a right to support, but also an implied reservation of a right to support to the tenement retained by the vendor. That is the principle applicable on the severance of two tenements mutually supporting each other. The principle is illustrated and explained in

(1) (1847) 16 M. & W. 484.
(2) 12 Ch. D. 60.
(3) Cro. Jac. 121.
(4) 4 D. J. & S. 185.

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Dugdale v. *Robertson* (1); *Caledonian Ry. Co.* v. *Sprot* (2); *North Eastern Ry. Co.* v. *Elliott* (3); *Richards* v. *Rose* (4); *Wheeldon* v. *Burrows* (5); *Murchie* v. *Black* (6): the reason underlying the authorities being the mutuality of the right to support. *Gayford* v. *Nicholls* (7) illustrates the distinction when the two tenements did not belong to the same owner.

[VAUGHAN WILLIAMS L.J. referred, as to the right to support being implied in a grant, to *Rigby* v. *Bennett.* (8)]

The law laid down in that case applies also to a devise *Phillips* v. *Low.* (9)

It is submitted that the defendants bring themselves either within the exception in *Wheeldon* v. *Burrows* (5), this being an easement of "necessity," or within those cases which shew that a grantor of one of two tenements is entitled to the reservation of the existing right to the support of the tenement which he retains.

Then it is contended on the part of the plaintiffs that the easement cannot be claimed, because it has been enjoyed *clam*, and reliance is placed on *Solomon* v. *Vintners' Co.* (10) and *Dalton* v. *Angus.* (11) The decision in the former case does not go to the extent that *clam* means "secretly": the word does not imply mere want of knowledge on the part of the owner of the servient tenement: it means that the easement must not have been enjoyed surreptitiously; it imports an intention to acquire a right fraudulently or surreptitiously. There has been nothing of that kind here.

[ROMER L.J. referred, as to the necessity of there being an open enjoyment of an easement, to Gale on Easements, 7th ed. p. 207, citing *Partridge* v. *Scott.* (12)]

In that case neither party was aware of the existence of the easement. The observations of the Lords in *Dalton* v.

(1) (1857) 3 K. & J. 695.
(2) (1856) 2 Macq. 449.
(3) (1860) 29 L. J. (Ch.) 808.
(4) (1853) 9 Ex. 218, 221.
(5) 12 Ch. D. 31, 59.
(6) (1865) 19 C. B. (N.S.) 190.
(7) (1854) 9 Ex. 702, 707–8.
(8) (1882) 21 Ch. D. 559.
(9) [1892] 1 Ch. 47.
(10) (1859) 4 H. & N. 585.
(11) 6 App. Cas. 740.
(12) (1838) 3 M. & W. 220, 229; 49 R. R. 578.

Angus (1) do not carry the law any further than is laid down in the previous cases.

[VAUGHAN WILLIAMS L.J. According to that case, if there is no knowledge, there is an end of prescription.]

No doubt, consent or acquiescence on the part of the owner of the servient tenement lies at the root of prescription: *Sturges* v. *Bridgman* (2); and here the existence of these tie-rods, which were necessary supports for a wooden dock, must have been actually known to the plaintiffs, or ought reasonably to have been known to them. This is shewn by the evidence. When an easement has existed on a man's land for over twenty years, an easement of the existence of which he must have known if he had paid proper attention to his property, he cannot be heard to say he did not know what was going on. In such a case knowledge will be imputed to him. It is submitted that the circumstances under which the right came to the owner of the dominant tenement are not such as to negative that right.

Hon. E. C. Macnaghten, K.C., and *Bryan Farrer*, for the plaintiffs. It is clear from the evidence that the directors of the plaintiff company, at the time they bought, were not aware of the existence of these tie-rods. Moreover, any presumption of actual knowledge is precluded by the acts of the parties, for Green's devisees would not have sold without any reservation of the right to support if they had been aware of and intended to reserve it. The discovery of the tie-rods was perfectly casual and accidental, the discovery being only made when the plaintiffs came to make excavations in their property. The question, then, is whether under ss. 2 and 5 of Lord Tenterden's Act, 2 & 3 Will. 4, c. 71, the defendants have enjoyed this easement for twenty years "as of right." The words "enjoyed by any person claiming right," in s. 2, and "enjoyment thereof as of right," in s. 5, mean an enjoyment nec vi, nec clam, nec precario: the enjoyment during the whole period of twenty years must have been open and notorious: *Tickle* v. *Brown* (3); *Bright* v. *Walker* (4); and consent and acquiescence

(1) 6 App. Cas. 740.
(2) (1879) 11 Ch. D. 852, 863.
(3) (1836) 4 Ad. & E. 369, 382; 43 R. R. 358.
(4) (1834) 1 C. M. & R. 211; 40 R. R. 536.

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of the owner of the servient tenement lies at the root of prescription; that is to say, the enjoyment must be of something of which he knew and which he might have interrupted: *Sturges* v. *Bridgman* (1): so also *Dalton* v. *Angus* (2); *Partridge* v. *Scott* (3); and *Gately* v. *Martin*. (4) A grantor cannot reserve an easement without expressing it in terms, on the principle that a man cannot derogate from his own grant: *Wheeldon* v. *Burrows* (5); *Suffield* v. *Brown*. (6) The only exception is in the case of an easement of necessity, such as a right of way to a landlocked tenement, or a necessary right of support, as in *Richards* v. *Rose*. (7)

But there is in the present case no such "easement of necessity" as was mentioned by Thesiger L.J. in *Wheeldon* v. *Burrows*. (8) The plaintiffs rely upon the fact that when they bought their wharf they had no knowledge of the easement now claimed, and there was nothing to bring it home to them.

Peterson, in reply.

Cur. adv. vult.

July 21. VAUGHAN WILLIAMS L.J. read the following judgment:—The question is, whether there has been gained, in respect of the dry dock of the defendants, the right to retain in or under the land of the plaintiffs certain rods or ties for the purpose of supporting or upholding the dry dock. The defendants claim the right in two ways: first, by way of implied reservation; secondly, by way of prescriptive easement. It is necessary, in order to judge of these claims, to state the history of the case. [His Lordship stated the facts, and continued:—]

I will now deal with the two legal questions in succession. First, was there, under these circumstances, any reservation by Green of the right of support by these tie-rods? Secondly, have Green or his successors, by enjoyment since 1877, acquired, by prescription or presumed lost grant, any right to this support? Now, as to the question of reservation, *Wheeldon* v. *Burrows* (9) puts beyond doubt the general rule, that, if a

(1) 11 Ch. D. 852, 863.
(2) 6 App. Cas. 740, 801, 819.
(3) 3 M. & W. 220, 229, 230; 49 R. R. 578.
(4) [1900] 2 I. R. 269, 272.
(5) 12 Ch. D. 55–6.
(6) 4 D. J. & S. 185, 197, 200.
(7) 9 Ex. 218.
(8) 12 Ch. D. 57–8.
(9) Ibid. 31.

grantor upon a conveyance of part of his property intends to reserve any right over the tenement granted, he must do so by an express reservation in the grant. So far *Wheeldon* v. *Burrows* (1) is a mere affirmation of the law as laid down by Lord Westbury in *Suffield* v. *Brown* (2), where he says: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. Consider the easements as if they were rights members or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner." But both Thesiger L.J. in *Wheeldon* v. *Burrows* (1) and Lord Westbury in *Suffield* v. *Brown* (2) recognise that there are some exceptions to this general rule. One exception is the case of necessity, of which a way of necessity is the most familiar instance. Another case of exception is the case of reciprocity, in which houses or other buildings are so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour. This exception is recognised by Lord Westbury (3) and by Thesiger L.J. in *Wheeldon* v. *Burrows* (1), the judgment of Pollock C.B. in *Richards* v. *Rose* (4) being generally the authority quoted for this exception of reciprocal or mutual easements. A third exception is where that which is claimed to be reserved is not an incorporeal easement, but part and parcel of a house or other building belonging to the conveying party, but not included in the conveyance. This exception is clearly recognised by James L.J. in a short supplementary judgment which he delivered in *Wheeldon* v. *Burrows*. (1) He said: "I only want to say something in addition, that in the case of *Nicholas*

(1) 12 Ch. D. 31.
(2) 4 D. J. & S. 185, 194.
(3) 4 D. J. & S. 198.
(4) 9 Ex. 218.

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v. *Chamberlain* (1) the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house." Thesiger L.J. also recognises the same exception, but put *Nicholas* v. *Chamberlain* (1) as an instance of an easement of necessity. Lord Westbury seems also to recognise this exception, for, speaking of *Nicholas* v. *Chamberlain* (1), he said (2): it is "a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances." The present case is on the border line, but there is a great deal to be said in favour of the contention of the defendants, that these tie-rods fastened to the piles constitute a corporeal part of the dry dock, which was reserved, and, being essential to the maintenance of the dry dock, as it stood before and at the time of the conveyance, fall within Thesiger L.J.'s view of this, which I have called the third exception, by being easements of necessity. On the whole, I think that the defendants are entitled to keep these tie-rods in the position in which they were originally placed, and always have been maintained, for the necessary purpose of the maintenance of the dry dock as built with its wooden sides. The tie-rods, in my opinion, are a corporeal part of the dry dock, just like the conduit or the cellar, or the flue mentioned by James L.J. The tie-rods were, I think, reserved with the dry dock as appurtenances thereof, as Lord Westbury expresses it.

I have only to add that I do not assert that the authorities uniformly recognise the exceptions which I have specified to the general rule laid down by Lord Westbury in *Suffield* v. *Brown* (3), namely, the rule that it seems more reasonable and just to hold that, if the grantor intends to reserve any right over property granted, it is his duty to reserve it expressly in

(1) Cro. Jac. 121. (2) 4 D. J. & S. 197.
(3) 4 D. J. & S. 185, 194.

the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by a fiction of an implied reservation. For instance, there is this statement made by Lord Chelmsford L.C. in *Crossley & Sons* v. *Lightowler* (1): "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it." But against this dictum one has to put all those cases in which a reservation is implied for a right of support by way of reservation in favour of the grantor. These cases will be found set out in the judgment of Wood V.-C. in the note to *Taylor* v. *Shafto* (2), which shew generally that the implication in favour of an existing support is easily made on the ground of necessity. It cannot, as it seems to me, be said that the result of the judgments in either *Wheeldon* v. *Burrows* (3) or *Suffield* v. *Brown* (4) is that it is impossible to presume a reservation from the state of things existing at the moment of severance of ownership of adjoining houses originally belonging to one owner. *Richards* v. *Rose* (5) was the case of two houses originally built together and belonging to the same owner, and there the Court presumed that, upon severance of ownership, there was a grant and reservation of a reciprocal right of support. It is, of course, true that the reciprocity is an important consideration in the inference, but the inference is not from user; it is based upon the fact of the state of things existing at the moment of severance. It may be that the presumption will more readily arise where there is reciprocity than where there is no reciprocity, but the principle is the same in either case. In each case there is an exception from the rule that a man shall not derogate from his own express grant. The grantor is allowed by implication to derogate from his own express grant. Why? Because of the state of things at the moment of severance.

(1) L. R. 2 Ch. 478, 486.
(2) (1867) 8 B. & S. 228, 252.
(3) 12 Ch. D. 31.
(4) 4 D. J. & S. 185.
(5) 9 Ex. 218.

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As to the prescriptive right, the only question is as to whether the enjoyment has been *clam*. It is said by Bramwell B. in *Solomon* v. *Vintners' Co.* (1) that the enjoyment must be of right, which it cannot be unless it was openly and visibly enjoyed. Bramwell B. is speaking of a weakly built house gradually coming to lean against some adjacent house. Such support is manifestly not visible in the sense in which the support is upon some structure or some part of an adjacent house which is intentionally appropriated as a means of support. Such a case seems, whatever may be the case where the support is by one house coming in course of time to lean against another, clearly to fall within the Prescription Act (2 & 3 Will. 4, c. 71). In the case of an artificial support, such as there is in the present case, I shall assume, notwithstanding the observations of Lord Blackburn in *Dalton* v. *Angus* (2), that acquiescence, and therefore knowledge or means of knowledge, is the basis of the easement, whether the right of support is based on the Prescription Act or on the fiction of lost grant. I agree, speaking of easements generally, that mere enjoyment is not sufficient to create the prescriptive right. This is only true in respect of the right to light. In order to gain for the owner of land by enjoyment a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is, or ought to be, known to the neighbour, and could without destruction or serious injury to his own close be interrupted by him. See the summary of the first argument in the House of Lords mentioned by Lord Blackburn in his speech in *Dalton* v. *Angus*. (3) But, in the case of easements of support by artificial means, expressly adopted for the purposes, which encroach upon adjacent land by buildings or by structures of any sort, such as the wharf and dock respectively in the present case, I think that the interest of the community, and especially of the inhabitants of large towns, requires that those who occupy adjacent buildings or structures should be taken to be warned of the inherent

(1) 4 H. & N. 585, 602. (2) 6 App. Cas. 817, 818.
(3) 6 App. Cas. 815.

probability of one building or structure being connected with and supported by some adjacent structure or building, and that this is especially so in a case where the owner of the alleged servient tenement is aware that that tenement, as well as the alleged dominant tenement, at the time of the construction of the structure on the dominant tenement belonged to one and the same owner. In such a case it seems to me that a very little ought to put the owner of such a tenement upon inquiry, and that if he makes no inquiry knowledge ought to be imputed to him. He is at least in the possession of knowledge which ought to have put him on inquiry. Indeed, it appears both from the passage about the relation of acquiescence to prescription which I have quoted from Lord Blackburn's judgment, and from the summary which I have quoted, that proof of actual knowledge is not essential to acquiescence. It is sufficient if the owner of the servient tenement ought to have known. It is sufficient if he had the means of knowledge. This makes the user open. The law of prescription, like the Statute of Limitations, is based on the convenience of the community, and not on natural justice. It would be very inconvenient if actual knowledge had to be proved as a condition of that acquiescence, which is the basis alike of the common law theory of lost grant and the Prescription Act. Means of knowledge is sufficient to make the user open. In the present case you have plenty of evidence that the nuts on the piles were visible, and the evidence of Mr. Jefferey, the expert, whose evidence every one accepts, shews plainly that the nuts and washers were obvious to sight, and I do not think that the evidence with reference to what is apparent acquiescence is negatived, because the plaintiffs' directors did not notice these nuts, or because a man ignorant of waterside structures would not know what the nuts and washers at the ends of the ties indicated. Moreover, in this case the plaintiffs were for a short time lessees of this property subject to this so-called easement—see *Dugdale* v. *Robertson* (1)—and this seems some reason for imputing to them, when they purchased the reversion, the knowledge of their predecessors in title, Messrs.

(1) 3 K. & J. 695.

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Freeman, who clearly consented to the tie-rods for support of the dock. I do not think that, assuming, as I of course do assume, that the defendants' predecessors in title, the East and West India Dock Company, knew of these tie-rods, and that Green, who was owner in 1877, the date of the conveyance to the plaintiffs, also knew, that this affects in any way the question of acquiescence by the plaintiffs for the purpose of prescription. Nor do I think that it negatives the presumption arising on the necessity to maintain the tie-rods as they were at the time of the severance and conveyance, if the adjoining structure reserved or excepted by the grantor was to continue to stand as it stood at that date.

ROMER L.J. read the following judgment:—In my opinion this appeal fails. In the first place, I think that when the vendors, through whom the defendants claim, conveyed the plaintiffs' land to the plaintiffs, no reservation can be implied in favour of the vendors of a right of support in respect of the defendants' dock. When the conveyance is looked at, it appears to me that the ties supporting the dock, so far as they are on the plaintiffs' land, cannot be treated as part of the dock, and as not being conveyed. The land conveyed is clearly described, and, in my opinion, must cover the place occupied by the ties. Nor is this one of those cases of difficulty, referred to in *Wheeldon* v. *Burrows* (1) and other authorities, where at the date of conveyance reciprocal rights as between the property conveyed on the one hand and the property retained by the vendors on the other might be inferred. That being so, then, following *Wheeldon* v. *Burrows* (1), by which we are bound, it is clear that a reservation of a right of support in the present case could only be implied if it were one of necessity. Now, all I need say on this part of the case is that the facts do not lead me to the conclusion that there was any such necessity proved, or to be inferred, as would require, or would justify the Court in holding, that the reservation should be implied.

That being so, the only remaining question is whether an easement has been acquired as against the plaintiffs under the Prescription Act. Now, on principle, it appears to me that a

(1) 12 Ch. D. 31.

prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. And I think on the balance of authority that this principle has been recognised as the law, and ought to be followed by us. In support of this statement I do not think it necessary to do more than refer to those parts, which deal with this point, of the speeches made by Lord Selborne and Lord Penzance in the House of Lords in *Dalton* v. *Angus* (1), and I gather that their views as there expressed on this point were not dissented from by the other members of the House who took part in the hearing of that case, and, indeed, Lord Blackburn said (2) that no prescriptive right "can be acquired where there is any concealment, and probably none where the enjoyment has not been open." Under these circumstances it appears to me only necessary to consider whether in the present case the enjoyment since the date of the conveyance to the plaintiffs has been open. In my opinion it has not. It is not established on behalf of the defendants that the plaintiffs were informed by their vendors at the time of the conveyance, or ever ascertained in fact by any of their agents until quite recently, that the defendants' dock was being supported by the plaintiffs' land. Nor can I see any circumstances in this case sufficient to justify the Court in holding that the plaintiffs ought to have such knowledge attributed to them, or were put on inquiry. And in particular it does not appear to me that the existence of the two nuts on the plaintiffs' premises, about which so much has been said, gave the plaintiffs or their agents a reasonable opportunity of becoming aware of the enjoyment by the defendants of the support of their dock by the plaintiffs' land, or put the plaintiffs on inquiry. I think, therefore, that the appeal should be dismissed.

STIRLING L.J. read his judgment as follows:—The first point decided by Cozens-Hardy J. was that, on the conveyance

(1) 6 App. Cas. 740. (2) 6 App. Cas. 827.

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to the plaintiffs of the wharf in 1877, there was no implied reservation to the vendor of the easement now claimed by the defendants.

On this point the governing authority is *Wheeldon* v. *Burrows* (1), decided by James, Baggallay, and Thesiger L.JJ., by the last of whom the judgment of the Court was delivered. In it two rules are laid down in the following terms (2): "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second . . . . is, that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity." After reviewing various cases, the learned judge said (3): "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land."

The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but they contended that the easement claimed by the defendants is an "easement of necessity" within the recognised exception to the second rule. Now, in the passages cited the expressions

(1) 12 Ch. D. 31. (2) 12 Ch. D. 49.
(3) 12 Ch. D. 58.

"ways of necessity" and "easements of necessity" are used in contrast with the other expressions, "easements which are necessary to the reasonable enjoyment of the property granted," and "easements . . . . necessary to the reasonable enjoyment of the property conveyed," and the word "necessity" in the former expressions has plainly a narrower meaning than the word "necessary" in the latter.

In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In *Wheeldon* v. *Burrows* (1) the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition; but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them. Some other exceptions to the general rule are mentioned in *Wheeldon* v. *Burrows* (1), and in particular reciprocal easements, but it was not contended, and it does not appear to me that this case falls within any of them. Nor do I think that the tie-rods here form part of the corporeal structure of the dock which can be held not to have passed by the conveyance of the adjoining property.

On the second point, the learned judge decided that no right had been acquired by the defendants by reason of the continuance of the rods and ties under the plaintiffs' land for upwards of twenty years, either under the Prescription Act or under the common law doctrine of a lost grant, because the enjoyment of the defendants had not been open—in this sense, that it had not come to the plaintiffs' knowledge, and was not of such a nature that their attention ought reasonably to have been drawn to it.

In *Dalton* v. *Angus* (2) much discussion took place as to the

(1) 12 Ch. D. 31. (2) 6 App. Cas. 740.

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nature and extent of the knowledge, or means of knowledge, which ought to be shewn to be possessed by a person against whom there is claimed a right of support for the building of another. Lord Selborne L.C. said (1) that a man "cannot resist or interrupt that of which he is wholly ignorant." And Lord Blackburn said (2): "The edict of the Prætor that possession must not be vi vel clam, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open." Both noble Lords came to the conclusion that in the case before them sufficient knowledge or means of knowledge on the part of the adjoining proprietor had been proved; and with them Lord Watson agreed. I think that *Dalton* v. *Angus* (3) establishes that there must be some knowledge or means of knowledge on the part of the person against whom the right is claimed. The present case seems to me to stand on the same footing as if the rods and ties had been placed in the land which now belongs to the plaintiffs, while that land, as well as the land now belonging to the defendants, was in the hands of their common predecessor in title, Henry Green. His devisees in 1877 sold to the plaintiffs, without reserving any right in respect of the ties and rods, the existence of which is not shewn to have become actually known to any agent of the plaintiffs until a recent date. The ties and rods are between twenty and thirty in number, and there are only two of which any visible signs appear upon an inspection of the exterior of the plaintiffs' property. Even as regards these two, the traces might, as it seems to me, be reasonably regarded as forming merely part of the camp-sheathing of the plaintiffs' own property. There are, no doubt, cases in which the owners of property have been held to be affected with notice of that which might have been discovered by the exercise of reasonable diligence (see, for example, *Hervey* v. *Smith* (4); *Phillipson* v. *Gibbon* (5)); but

(1) 6 App. Cas. 801.
(2) Ibid. 827.
(3) 6 App. Cas. 740.
(4) (1856) 22 Beav. 299.
(5) (1871) L. R. 6 Ch. 428.

the learned judge came to the conclusion that in this case such a notice ought not to be attributed to the plaintiffs; and I am unable to differ. I think, therefore, that the appeal should be dismissed.

Solicitors : *Drake, Son & Parton ; Renshaw, Kekewich & Smith.*

W. L. C.

In re HOTHAM. HOTHAM *v.* DOUGHTY.

[1901 H. 2209.]

Settled Land—Capital Moneys—Investment on Mortgage—Tenant for Life—Trustees for Purposes of Settled Land Acts—Inquiry into Title and Value—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*i.*); *s.* 22, *sub-s.* 1.

Upon a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, given by the tenant for life to the trustees for the purposes of the Settled Land Act to invest capital moneys in their hands upon a specified mortgage of real estate, the Court declared that the trustees were not bound to invest upon the mortgage unless and until they were satisfied that the direction had been given upon a proper investigation as to title, and upon a proper report as to the value of the proposed security, and upon proper advice as to the form of the mortgage, and that on being so satisfied the trustees were bound to make the investment.

Order of Cozens-Hardy J. varied.

APPEAL from a decision of Cozens-Hardy J. (1)

By the will of A. T. Hotham, deceased, certain real and personal estate was devised and bequeathed to the respondents upon certain trusts for conversion and for investment in the purchase of real estate to be settled to uses under which the applicant was tenant for life in possession, with remainders over. The respondents were the trustees of the settlement created by the will for the purposes of the Settled Land Act, 1882.

In pursuance of the trusts of the will the respondents purchased a residential estate known as the Worlingham Hall estate, and this estate was duly assured to the uses of the

(1) [1901] 2 Ch. 790.

C. A. 1902 HOTHAM, *In re.* HOTHAM *v.* DOUGHTY.

settlement. The applicant was unwilling to continue to reside at Worlingham Hall, and he determined to sell this estate under the powers of the Settled Land Acts. Accordingly, on February 7, 1901, he entered into a conditional contract, subject to the approval of the Court, for the sale of this estate to the Hon. A. J. Mulholland, and the contract provided that two-thirds of the purchase-money should remain on mortgage. This contract was approved by the Court, subject to certain alterations which were accepted by Mr. Mulholland. In pursuance of this contract, a draft conveyance was prepared and approved, and in further pursuance thereof a draft mortgage to secure the sum of 33,724*l.* to the respondents was prepared on behalf of the applicant, and approved on behalf of Mr. Mulholland, and it was then forwarded to the respondents. The respondents required certain alterations to be made in the form of the mortgage, and in particular they desired that the mortgage should contain a covenant excluding the operation of s. 18 of the Conveyancing and Law of Property Act, 1881. The applicant denied the right of the respondents to insist upon these alterations, and took out a summons to determine this question. The summons asked for a declaration that, upon a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, given by the applicant as tenant for life under the above-mentioned settlement to the respondents as trustees of the settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the respondents were bound to invest the same accordingly, if the mortgage purported upon its face to be such a mortgage as was by the settlement or by law authorized as an investment of such capital moneys, and that they were not under obligation or entitled to satisfy themselves as to the title to or value of the security included in the mortgage, and that they were not entitled to make any alteration in the form of the mortgage. Cozens-Hardy J. declared that the respondents were not bound to invest in a particular mortgage unless and until they were satisfied that such mortgage was an investment authorized by law, that a good title had been shewn, that

the value of the security was adequate, and that the form of the mortgage was proper. The applicant appealed from this decision.

A. & B. Terrell and *Bovill*, for the appellant. The question turns upon ss. 21 (i.), 22, 41, 42, and 53 of the Settled Land Act, 1882. The scheme of the Act, as explained in Wolstenholme's Conveyancing and Settled Land Acts, Part V., c. 1, is to entrust the well-being of the settled land to the tenant for life. For this purpose very wide powers are vested in him, and in exercising those powers he is made a trustee for the persons interested in the corpus. The working of the Act rests entirely with him, and the trustees of the settlement for the purposes of the Act are mere depositaries of money. Where land is purchased or any other investment is made by direction of the tenant for life, the trustees have no voice in making the purchase or investment. They are in no way responsible for the propriety of the purchase or investment, provided it appears to be authorized by the Act or by the settlement: *In re Lord Coleridge's Settlement.* (1) It follows that the tenant for life is the proper person to satisfy himself as to the value, the title, and the form of the mortgage. The tenant for life would be responsible under s. 8 of the Trustee Act, 1893, and therefore it is for him to obtain the report of a competent surveyor as to value, and to determine the sufficiency of the title. If the trustees are to have a similar concurrent right, matters would inevitably come to a deadlock.

Eve, K.C., and *H. Fellows*, for the respondents. The trustees cannot be called upon to part with the moneys under their care until they are satisfied that the investment is authorized by law, and in order to do that they must be satisfied as to the value and as to the title. No doubt the tenant for life is a trustee so far as regards the powers exercised by him, but the power of investment is vested by s. 22, sub-s. 1, of the Settled Land Act, not in the tenant for life, but in the trustees. That power, as defined in s. 21 (i.), is to invest upon securities upon which trustees are by the settlement or by law authorized

(1) [1895] 2 Ch. 704.

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to invest trust moneys. To ascertain what investments are authorized by law, s. 1 of the Trustee Act, 1893, must be read into s. 8. The result of that is that the question of value comes in by implication, so that if the requisite margin is not reserved the investment is not authorized. If a trustee is liable for breach of trust for transgressing the margin of value, the investment is to that extent unauthorized. That construction is borne out by s. 9.

[VAUGHAN WILLIAMS L.J. In the note to that section in Hood and Challis's Conveyancing, Settled Land, and Trustee Acts, the distinction is drawn between improper and unauthorized investments.]

We submit that there may be an unauthorized investment in authorized securities.

In answer to a question from the Court, counsel for the respondents said that the trustees merely wanted to be protected against possible claims by the remaindermen; and the Court (Vaughan Williams, Romer, and Stirling L.JJ.) then made the following order:—

Vary the judgment of the Court below by declaring that upon a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, given by the appellant as tenant for life under the above-mentioned settlement to the defendants as trustees of the said settlement for the purposes of the Settled Land Act, 1882, to invest capital moneys in their hands as such trustees as aforesaid upon the security of a mortgage referred to in such direction, the defendants as such trustees as aforesaid are not bound to invest the same accordingly, though such mortgage purports upon its face to be such a mortgage as is by the settlement or by law authorized as an investment, unless and until they are satisfied that the direction of the tenant for life with reference to any particular investment or mortgage has been given upon a proper investigation as to title, and a proper report as to the value of the proposed security, and upon proper advice as to the form of the mortgage; but that upon being so satisfied the defendants are bound to make such investment.

Solicitors: *Rowcliffes, Rawle & Co., for Hamilton Fulton, Salisbury; Collyer-Bristow, Hill, Curtis & Dods, for Stone, Simpson & Mason, Tunbridge Wells.*

H. B. H.

In re THE REGISTERED TRADE-MARKS OF BASS, RATCLIFFE & GRETTON, LIMITED (No. 2), AND OTHERS.

C. A. 1902 July 28, 29.

Trade-mark—Registration — Removal from Register — Mark "calculated to deceive"—Word "Trade-mark" printed on part of Label registered as a whole.

The fact that upon a part of a label, the whole of which is registered as a trade-mark, there is printed the word "trade-mark," is not necessarily calculated to deceive as suggesting that that part alone constitutes the trade-mark.

The Court must decide from the circumstances of the particular case before it whether the position of the word "trade-mark" is calculated to deceive, and whether, if it is, there is a reasonable probability of any one being injured by it.

Per Romer L.J.: The decision of the Court of Appeal upon this point in *In re Apollinaris Company's Trade-marks*, [1891] 2 Ch. 186, was upon a question of fact, and does not therefore bind the Court except in a case in which the facts are identical.

In 1876 a label was registered as a trade-mark by a firm of brewers as an "old mark," i.e., one which they had used for some years before December 31, 1875. In the centre of the label was a diamond or four-sided figure, and the label was surrounded by an ornamental border. Upon the diamond was printed the word "trade-mark." The firm also in 1876 registered the diamond alone as a trade-mark.

In 1900 a rival firm of brewers applied to have the label removed from the register, on the ground that the printing of the word "trade-mark" upon the diamond was calculated to deceive, as suggesting that it alone constituted the trade-mark, and that the remainder of the label might be imitated:—

Held, by the Court of Appeal, that under the circumstances the position of the word "trade-mark" upon the label was not calculated to deceive; that there was no reasonable probability of any one being injured by it; and that there was no ground for removing the label from the register.

Decision of Kekewich J. (founded upon *In re Apollinaris Company's Trade-marks*, [1891] 2 Ch. 186) reversed.

APPEAL from an order made by Kekewich J. removing from the register several registered trade-marks of Bass, Ratcliffe & Gretton, Limited, brewers. The application for removal was made by John Davenport & Sons' Brewery, Limited, who were rival brewers. One of the marks, No. 2, which may be

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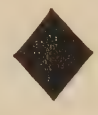
taken as a specimen, was registered on January 1, 1876, by Messrs. Bass & Co., the predecessors in business of the above limited company, and they claimed the user of the mark for eighteen years prior to December 31, 1875. The mark was registered for Burton ales, brown beers, and stouts. The mark consisted of a label of oval shape, which was surrounded by an ornamental border. In the centre of the label was a solid diamond or four-sided figure of this shape :—



Upon the diamond was printed the word "trade-mark." Underneath the diamond was the signature "Bass & Co." Above the diamond on the left-hand side were the words "Bass & Co.'s." Around the outer rim of the label was printed—"This label is issued only by Bass & Co., Brewers, Burton-upon-Trent." The diamond as registered was black. In actual use it was printed in different colours, according to the kind of beer, &c., to which the label was applied.

On January 17, 1876, Bass & Co. registered for the same class of goods a trade-mark which consisted simply of a solid diamond coloured red. They claimed the user of this mark for eleven years prior to January 15, 1876.

Kekewich J. held that the label No. 2 was "calculated to deceive" by inducing those who read it to believe that the diamond, on which the word "trade-mark" was printed, was alone the registered trade-mark, and to suppose, therefore, that the rest of the label might be imitated. On this ground he ordered the registration to be vacated. His Lordship thought the case was governed by the decision of the Court of Appeal in *In re Apollinaris Company's Trade-marks.* (1)

The Bass Company appealed.

Moulton, K.C., J. Cutler, K.C., and *F. P. M. Schiller*, for the Bass Company. In *In re Apollinaris Company's Trade-marks*(1) the Court was dealing, not with an old mark, but with a new

(1) [1891] 2 Ch. 186, 233.

one; and it is submitted that the language used by Fry L.J. in delivering the judgment of the Court cannot be construed as referring to an old mark. It is submitted that in the present case there is nothing "calculated to deceive."

Warmington, K.C., Neville, K.C., and *Sebastian*, for the Davenport Company. Placing the word trade-mark upon the diamond amounted to an assertion that the diamond alone was the trade-mark, and, that being so, the Court will infer an intention to deceive. The *Apollinaris Case* (1) has been followed since. It was recognised by Chitty J. in *In re Phillips' Trade-marks*. (2) It is important that the Court should draw a uniform inference in such cases.

R. J. Parker, for the Comptroller.

VAUGHAN WILLIAMS L.J. I think the position of the word "trade-mark" on this diamond cannot mislead any one or do harm to any one. That is all which it is necessary for us to decide.

ROMER L.J. I wish to add a few words, because our decision may and probably will affect other cases hereafter.

Speaking for myself, I must say that I do not like the decision of the Court of Appeal on the point we are now considering in the *Apollinaris Case*. (1) Of course, we should be bound by that decision if it were a decision on a question of law. But I do not consider it was a decision on a question of law. I think it was a decision on a question of fact, and, that being so, we are not bound by it unless the facts of the particular case before us are precisely the same; and in the present case the facts are not precisely the same. I am bound to say that I should not have come to the same conclusion on the facts as the Court of Appeal did on this point in the *Apollinaris Case* (1); but that is immaterial.

I should like, however, to say a few words on the principle which governs such a case as this. In my opinion it cannot be that in every case the printing of the word "trade-mark" upon a trade-mark label, without anything more, would be

(1) [1891] 2 Ch. 186. (2) [1891] 3 Ch. 139.

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calculated to deceive. It cannot, I think, be wrong to state on a label which is intended to be used as a trade-mark that it is a trade-mark, and you may place the word "trade-mark" on the label so as to denote that the whole of it is intended to be included in that word. The word must be placed somewhere on the label, and why, because it is placed on some particular part, you are bound of necessity to assume in every case that that particular part alone is intended to be designated by the word, I cannot see. You may possibly be justified in assuming it in some circumstances. I do not doubt that. But in my opinion it ought not to be assumed in every case in which the word "trade-mark" is placed on a label that it must be intended to refer solely to that particular part of the label on which it is placed. Take the very case we have now before us. Suppose the word "trade-mark" had been placed on the ornamental rim which surrounds the diamond: would any one suppose—would it be a natural inference—that Bass & Co. meant that the rim alone was their trade-mark? In my opinion it would not. Therefore I think it is clear that you cannot lay down as a general rule that, whenever the word "trade-mark" appears on a label, it must be intended to denote only that particular part of the label on which it is placed.

In the present case the word "trade-mark" is placed in the centre of the label upon the diamond, and I do not know why I should be bound to assume that the word is intended to apply only to the diamond. But it may so apply, and I will assume that it does. What then? In every case in which the word "trade-mark" is placed upon a particular portion of a label to denote that that portion is a trade-mark, is the Court bound of necessity to hold that the label is calculated to deceive? In my opinion it is not. It may, no doubt, in some circumstances be calculated to deceive. If, for example, the part of the label to which alone the word is intended to refer is not in fact the subject of a separate trade-mark, I think the label would be calculated to deceive, because it would lead an ordinary person reading it to suppose that the owner of the label as a whole had a specially greater right as against the public than he really had. But if there were a separate trade-

mark for that part of the label which is designated by the word "trade-mark," why should it be assumed in every case that the word is calculated to deceive? As I have pointed out in the course of the argument, it is not sufficient to say that the label is "calculated to deceive." It must be shewn that it is reasonably calculated to injure some one—to lead him to do or to abstain from doing some act the doing or the abstaining from doing which may possibly injure him. Now, there may be a perfectly innocent deception which would injure no one. If there were such an innocent deception, it ought not to be a ground for removing a trade-mark from the register. The truth is the Court ought in each case to see in the first place whether, assuming that the word "trade-mark" refers to a particular portion only of the label, there would be a natural inference that the rest of the label, or the label as a whole, was not a trade-mark. Speaking for myself, I refuse to take it as a natural or necessary inference in every case, from the fact that a particular portion of a label is designated as a "trade-mark," that the whole of the label is not a trade-mark. In my opinion, such a conclusion ought not to be drawn in every case. You ought to go further, and to ask in each case, Can it be supposed from the particular facts of the case that there is any substantial probability of injury?

The point could not be better illustrated than by the case now before us. Look at this very trade-mark. If any one were led to suppose that the word "trade-mark" referred to the diamond alone, would it be a natural inference that he might with impunity imitate or disregard the rest of the label? I should say certainly not. He could not possibly be injured. There could be no such deception as would injure any ordinary reasonable human being. On that ground alone I should have thought it could not be said that there was such an intention to deceive, or that the label itself was so calculated to deceive, as to justify the Court in holding that it was not a proper subject of a trade-mark.

I repeat that when the word "trade-mark," which does not of necessity mean the only "trade-mark," is capable of being used innocently, I should have thought there would be a

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natural presumption in favour of innocence, and that you ought not to assume deception intended, or deception likely to result, unless it is a necessary inference. I cannot see that in every case the marking of a particular portion of a trade-mark with the word "trade-mark" would justify you in holding that there is deception, because it implies that the rest is open to the trade, or is not the subject of a trade-mark. There ought to be a presumption in favour of fairness and honesty, and that applies especially to the present case, seeing that this trade-mark has been in use and has been registered for such a great number of years, and no person has ventured to come forward to say that any one has either been injured or could possibly be injured. I refuse to draw the inference that any one could be injured; indeed, I am perfectly certain that no one could be injured. I think, therefore, that the appeal ought to be allowed.

MATHEW L.J. I am of the same opinion. The question is one of fact, and I think the less said about it by the Court the better.

Solicitors: *McKenna & Co.; John Westcott, for Wright & Marshall, Birmingham; Solicitor to the Board of Trade.*

W. L. C.

JEREMIAH AMBLER & SONS, LIMITED *v.* BRADFORD CORPORATION.

C. A.
1902
June 24, 25, 30; *July* 21.

[1900 J. 1781.]

Public Authority — Corporation — Statutory Powers — Provisional Order — Electric Lighting — "Public Duty" — Negligence — Action — Acts done in Execution of Statute — Judgment — Costs — "Solicitor and Client" — Appeal — Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

By the Public Authorities Protection Act, 1893, s. 1 (*b*), judgment for the defendant in an action brought in respect of acts, or alleged defaults, in execution of an Act of Parliament, "or of any public duty or authority," carries costs as between solicitor and client:—

Held, that the protection of the section extended to a municipal corporation acting under the powers conferred upon it by a provisional electric lighting order, duly confirmed by statute.

The enactment does not apply to appeals.

By a provisional order, the Bradford Electric Lighting Order, 1883, confirmed by the Electric Lighting Orders Confirmation (No. 8) Act, 1883 (46 & 47 Vict. c. ccxx.), it was provided (s. 2) that the order should be read and construed subject in all respects to the provisions of the Electric Lighting Act, 1882, and of any other Acts or parts of Acts incorporated therewith, which said Act and Acts and parts of Acts were in the order collectively referred to as "the principal Act." By s. 4 the "undertakers" for the purpose of the order were the Bradford Corporation, who were authorized, by s. 8, to supply electricity within the borough of Bradford for public and private purposes, and, by ss. 9 and 10, to purchase or take on lease lands by agreement, and to exercise the powers conferred upon them by the order and the principal Act. Then the order contained numerous sections conferring upon the corporation powers for executing the necessary works in connection with electric lighting. By s. 68 the corporation were made answerable for all accidents, damages, and injuries happening through their act or default, or that of any person in their employment, in consequence of their works. By s. 69 the provisions of

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ss. 264 and 265 of the Public Health Act, 1875, were incorporated with the order.

The plaintiffs or their predecessors in title had carried on the business of mohair and worsted spinners at the Midland Mills, Bradford, since the year 1863. Part of the plaintiffs' premises was built over a stream called the "Bradford Beck," which drained the Bradford Valley, the stream being covered over at this point. In October, 1899, the defendants, who were proposing to erect electric lighting works under the powers of their provisional order for lighting the town of Bradford, built high brick walls along both sides of the stream, and erected a main sluice across it about 300 yards below the plaintiffs' premises, and also side sluices on one side of the stream between the main sluice and the plaintiffs' premises. The object of these sluices was to divert the stream so as to supply motive power for driving the electric machinery in the defendants' works on adjoining land, which, together with a portion of the bed of the stream, they had acquired for the purpose of their undertaking.

On July 12, 1900, a heavy thunderstorm burst over the Bradford Valley, filling the Bradford Beck and causing a flood, which, the plaintiffs alleged, by reason of the obstruction of the sluices and the consequent heading back of the water, forced up the covering of the stream on the plaintiffs' premises and poured into the basement of the premises, leaving, when the water had subsided, a black deposit of mud some inches in depth, with the result that large quantities of goods and machinery belonging to the plaintiffs were damaged.

On September 28, 1900, the plaintiffs commenced this action claiming, on the ground that heavy rain-storms might be expected to occur again in the Bradford Valley, an injunction to restrain the defendants from obstructing the flow of water in the beck, and from allowing the sluices to remain so as to obstruct the flow; and they also claimed 33,794*l.* damages for the alleged negligence or improper acts of the defendants. The defendants denied that any obstruction had been caused by the sluices, which they said were of adequate construction and size to give free passage to any quantity of water in the

stream that could be reasonably foreseen or provided for. They also insisted that the thunderstorm that was said to have led to the alleged damage was one of unprecedented severity, causing in the beck a flood of unexampled height and volume, and such as could not have been foreseen by them; that any damage the plaintiffs had suffered had been caused by such an extraordinary and excessive rainfall that it was impossible by any reasonable precaution or foresight in the construction of the sluices or otherwise to have prevented it; and that such damage was the result of vis major. They also alleged that the act, neglect, or default (if any) in respect of which the plaintiffs brought this action was done in pursuance and execution, or intended execution, of Acts of Parliament and of public duty and authority, namely, in pursuance and execution, or intended execution, of (among other Acts) the Electric Lighting Acts, 1882 and 1888, and the Bradford Electric Lighting Order, 1883, confirmed by the Confirmation Act of 1883.

The action was tried before Joyce J., who, on August 3, 1901, delivered judgment dismissing the action, on the ground that the evidence, which was conflicting, had failed to convince him that the construction or existence of the sluices had been the cause of the damage to the plaintiffs.

At the conclusion of the judgment it was submitted on behalf of the defendants that they were a public body acting under the powers of an Act of Parliament, and were, therefore, entitled to their costs as between solicitor and client, under s. 1 (*b*) of the Public Authorities Protection Act, 1893 (1); but

(1) The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), is intituled "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

Sect. 1 is as follows: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: . . . .

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

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the point was not argued. His Lordship said he did not see that the defendants had been so acting as alleged, and, therefore, allowed them costs as between party and party only, but gave them leave to appeal upon that point, if they so desired.

The case now came on before the Court of Appeal on two separate appeals, the one by the plaintiffs from so much of the judgment as dismissed the action, and the other by the defendants from so much of the judgment as refused to give them solicitor and client costs.

The plaintiffs' appeal was dismissed, their Lordships holding, upon the evidence, that the damage in respect of which the plaintiffs had sued had not been caused by the sluices.

The defendants' appeal, upon the question of costs, was then argued.

Sir R. Reid, K.C., Balfour Browne, K.C., Tindal Atkinson, K.C., and *J. Waugh*, for the defendants. The corporation are the electric lighting authority for Bradford, acting under statutory powers: it is submitted, therefore, that the learned judge had no option but to give them costs as between solicitor and client under s. 1 of the Public Authorities Protection Act, 1893. These sluices were a necessary part of the works the corporation were authorized to construct, and the plaintiffs' allegation is that the injury complained of arose by reason of these sluices. The title of the Act, which must be read as part of the enactments, itself shews that the object of the Act is "the protection of persons acting in the execution of statutory and other public duties"; and the Act applies to judgments in all actions in the Chancery Division for injunction or for damages, though not to appeals or interlocutory applications: *Fielding* v. *Morley Corporation* (1); *The Ydun*. (2) *Chamberlain & Hookham, Limited* v. *Bradford Corporation* (3) shews what a wide interpretation has been put upon the Act by the Court of Chancery. The fact that clause 69 of the provisional order incorporated s. 264 of the Public Health Act, 1875, giving a local authority "full costs of suit" where an action

(1) [1899] 1 Ch. 1, 3, 4; [1900] A. C. 133.
(2) [1899] P. 236, 239.
(3) (1900) 83 L. T. 518.

had been unsuccessfully brought against it, shews that the Legislature intended the corporation to have the benefit of that section, which was then in force. Had it been in force now, the corporation would clearly have been entitled to their "full costs" of the present action. That section has, however, since been repealed by the Public Authorities Protection Act, 1893, as shewn by the schedule, and it may be fairly inferred that the Legislature intended the corporation should have the benefit of the substituted enactment, s. 1 of the latter Act. The section is wide in its terms, and covers the case of "any" action against any person "for any act done in pursuance, or execution, or intended execution . . . . of any public duty or authority." The corporation have been acting in execution, or intended execution, of a "public duty or authority" imposed on them by Act of Parliament as "undertakers," and therefore clearly come within the express words of the section, which are not in any way limited.

Neville, K.C., *Hughes, K.C.*, and *Kenyon Parker*, for the plaintiffs. The real question is whether the section is to be treated as unlimited in its effect, so that in every case, where a public authority is unsuccessfully sued, it is entitled to solicitor and client costs, even where, as in the present case, it has entered upon an enterprise simply of a commercial nature. In *Fielding* v. *Morley Corporation* (1) the subject-matter of the action was allowing water to overflow from an aqueduct which the corporation, acting apparently under special statutory powers, had carried over some one else's land. But that is not the sort of case now before the Court. The corporation are not acting in the execution of any "public duty" in lighting the town. They simply have power to do so if they choose, and in undertaking to supply the town with electric light they are doing nothing more than voluntarily entering upon a commercial enterprise. The mere fact of their being called "undertakers" in the order does not necessarily lead to the inference that that is a "public duty" which is otherwise not so. All the Act intends is to impose a penalty for vexatious proceedings against a public authority, not that every person

(1) [1899] 1 Ch. 1.

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suing a corporation is to be mulcted in a penalty for daring to do so. "Public duty" is the criterion, as shewn by the very title of the Act: and what "public duty" was there on this corporation to supply electricity at all, or to erect sluices of this kind as part of their works? They were under no such obligation. In *The Ydun* (1), as well as in *Fielding* v. *Morley Corporation* (2), the public authority was acting in pursuance of a public duty or carrying out an obligation. In the latter case, the Court of Appeal said that some limitation must be put upon the Act. *Chamberlain & Hookham, Limited* v. *Bradford Corporation* (3) went too far, for there the meters which were alleged to be infringements of the plaintiffs' patent were not made by the corporation, but were obtained by them from a third person and hired out to consumers. It is now becoming a matter of common occurrence for a corporation to enter into these quasi-commercial enterprises, and it is a serious thing if they can recover costs of litigation conducted, it may be, in the most expensive style.

Cur. adv. vult.

July 21. VAUGHAN WILLIAMS L.J. read s. 1 (*b*) of the Public Authorities Protection Act, 1893, and proceeded:— Lindley M.R. points out in his judgment in *Fielding* v. *Morley Corporation* (4), which was affirmed in the House of Lords (5), that although the "language" of the statute "is wide, the key to the enactment is" a desire "to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties." Lindley M.R. apparently thought that some limitation must be put on the wide words of the section. He seems to think that the limit is that the section does not apply to private persons acting in pursuance of a statutory authority, but only to persons who are acting in pursuance of public duties or authorities; but he does not so decide. On the contrary, he says: "It is not necessary to consider what

(1) [1899] P. 236.
(2) [1899] 1 Ch. 1; [1900] A. C. 133.
(3) 83 L. T. 518.
(4) [1899] 1 Ch. 4.
(5) [1900] A. C. 133.

cases, if any, do not fall within the Act, although apparently within the words. I add that by way of precaution, because some day there will probably be a great discussion as to what acts or defaults do or do not come within it." Sir F. Jeune P., in *The Ydun* (1), held that the Act applies to a public authority acting in pursuance of a trade or business which in private hands would be of a private character. This decision was affirmed by the Court of Appeal, but the judgments do not go quite the length of the judgment of Sir F. Jeune. I mean that the judgments in the Court of Appeal do not necessarily affirm the proposition that the Act applies to municipal trading under the authority of a special Act or order which a corporation or other public body chooses to obtain just as any private person might do without being under any obligation so to do. The public authority in regard to such trading is, in fact, a mere volunteer; and it may be urged that, as the public authority is under no obligation to exercise the statutory authority which it has obtained, and is at liberty to make a profit by the exercise of the authority, such profit, however, going of course in reduction of local taxation, there is no reason why a public body trading in competition with private traders should be protected as to either costs or the time within which an action should be brought. The Court of Appeal, in affirming the judgment of the President in *The Ydun* (1), certainly proceeded rather on the ground that the action had been brought against a public body in respect of alleged default on their part in the execution of their public duty as the authority for the port and harbour of Preston.

In the case, however, of *Chamberlain & Hookham, Limited* v. *Bradford Corporation* (2) the defendant corporation were empowered by a provisional order, duly confirmed, to supply electricity within their district, and one of the clauses empowered the corporation to "let for hire any meter for ascertaining the value of the supply of electricity by them to any customer." The corporation hired meters for this purpose, which the plaintiffs alleged were an infringement of their patent; and in respect of such alleged infringement they

(1) [1899] P. 236. (2) 83 L. T. 518.

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sought an injunction, but their action was dismissed with costs. Kekewich J. held that the corporation were entitled to have their costs taxed as between solicitor and client, as they were, in supplying the meters, acting in pursuance of a public "authority" within the meaning of s. 1 of the Act of 1893. If that case is good law it clearly covers the present, but it does not bind us if it is wrong. The argument against it being good law is put somewhat in this way. It is said that the proper conclusion to draw from the judgment of Lindley M.R. in *Fielding* v. *Morley Corporation* (1) is that it is only public authorities which come within the purview of the Act; and that if this is so it is only acts done by public authorities as such—that is to say, acts done by public authorities in pursuance of a duty imposed on them by the common law, or by statute—which fall within the protection of the statute 56 & 57 Vict., or any other statute passed for the protection of persons acting in the execution of statutory and other public duties; and that the exercise by a corporation of authorities or powers to carry on a business of electric light supply, or any other business which may be carried on by any person who or company which obtains the necessary order and statutory confirmation, is not something done "in the execution of statutory or other public duties" as mentioned in the title to the statute; and that the words of s. 1, "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," must be construed as limited to things done in the execution of statutory and other public duties.

There does not seem to be any case which decides that the words of the statute must be limited in this way. Sir F. Jeune, in *The Ydun* (2), says that a railway company, although it certainly does act in pursuance or execution of an Act of Parliament, is not included within the operation of s. 1; but, as he goes on to say that a public authority is protected by the section even when acting in pursuance of trade or business, I presume his view is that a railway company is not a public authority within the meaning of the statute.

(1) [1899] 1 Ch. 1. (2) [1899] P. 236.

In *Attorney-General* v. *Margate Pier and Harbour Co.* (1) Kekewich J. held that a pier and harbour company did not fall within the section; but in that case part of the earnings were appropriated to a dividend for the shareholders.

On the whole, I think it is sufficient to say in this case that the Bradford Corporation were acting in pursuance of an Act of Parliament, and that the protection of the Act seems plainly to extend to a municipal authority supported primarily by the levy of rates, and which is bound to apply all the earnings of any undertaking authorized by statute in relief of the ratepayers.

I think, therefore, that we ought to order that the judgment obtained by the Bradford Corporation against the plaintiffs shall carry costs, to be taxed as between solicitor and client. It may seem hard that this unequal liability for costs should be imposed upon the plaintiffs in a case where the Act of Parliament, under the authority of which the defendant corporation were acting, left it absolutely optional with them whether or not they should erect the structure complained of in the place which they did, and where the only question between the parties was the very arguable question as to whether or not the structure thus erected by the corporation was an invasion of the rights of the plaintiffs as riparian proprietors; but I can find nothing in the Act to justify the exclusion from the protection afforded by the Act to public authorities of such a case as this.

ROMER L.J. I need say but a few words on this appeal. Having regard to some of the arguments used on behalf of the plaintiffs, I think it right to state that this Court is not concerned with the policy of the Legislature in passing the Public Authorities Protection Act, 1893, and ought not to approach any question as to the application of the Act to a particular case with any feeling that it is desirable that the provisions of the Act should, if possible, either be enlarged or be curtailed in their application. The Act must be properly construed and applied, even if the result may in certain cases appear to bear

(1) [1900] 1 Ch. 749.

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hardly on plaintiffs or applicants. Now, I agree with the argument on behalf of the plaintiffs in the present case, that in construing the Act the Court may and ought to look to the general scope of the Act as expressed in its title. But so doing, it still appears to me that the present action comes within the operation of the Act. The defendants, in lighting or providing for the lighting of the streets of Bradford under the powers conferred upon them by their provisional order, were, in my opinion, acting in execution of a public duty or authority. The sluices and works complained of by the plaintiffs were erected by the defendants in pursuance of, and solely in execution or intended execution of, those powers, and therefore constituted, within the words of the statute, an "act done in pursuance or execution, or intended execution, of a public duty or authority." And this action is one which seems to me expressly to fall within the statute, for the sole cause of complaint of the plaintiffs as against the defendants is the erection by the defendants of the sluices and works in question, and the action is one against the defendants "for" such an act as is specified by the statute. It is not an action based on some conduct of the defendants which is only indirectly concerned with their public duty or authority: it is an action whose ground is an act done by the defendants directly in execution, or intended execution, of their public duty or authority.

I think, therefore, the appeal should be allowed.

STIRLING L.J. I am of the same opinion. The defendants acquired some land which adjoined a stream, including a portion of the bed of the stream, and upon that they proceeded to erect certain sluices, the object of which was to divert the stream so as to supply motive power for the driving of the electric machinery placed in the works which they erected on the adjoining land. It seems to me that the sluices formed part of the works which they had statutory power to construct. In the case of *Fielding* v. *Morley Corporation* (1) the defendants were also a municipal corporation. The municipal corporation

(1) [1899] 1 Ch. 1.

had statutory power to supply the municipality with water, and in the exercise of that power they proceeded to construct an aqueduct, with reference to which the action was brought. It was held that the Act applied, and the costs were allowed on the higher scale. I may point out that one of the arguments which was used in the present case—that there was no positive duty, and that it was simply convenient in that case to supply the water—was used, and did not prevail. I think, therefore, the appeal ought to be allowed.

VAUGHAN WILLIAMS L.J. The appeal will be allowed with costs, not as between solicitor and client, but as between party and party.

Solicitors for plaintiffs: *Leslie & Hardy, for Greaves & Greaves, Bradford.*

Solicitors for defendants: *Cann & Son, for F. Stevens, Bradford.*

G. I. F. C.

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In re BUCKWELL & BERKELEY.

[1901 B. 3210.]

Solicitor—Costs—Taxation—Allowances—Disbursements—Deposit as Security for Costs of Discovery—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 25, 26.

Deposits paid by a solicitor on behalf of his client as security for costs of discovery under Order XXXI., rr. 25, 26, and not repaid, are not disbursements within s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and are not properly included in the solicitor's bill of costs.

They should be entered in the solicitor's cash account.

Decision of Kekewich J. reversed.

THIS was a summons for the review of the taxation of a bill of costs of the applicants, Messrs. Buckwell & Berkeley of Brighton, as solicitors for the plaintiff in an action of *Theobald* v. *Theobald*. The action was by a wife against her husband to recover money lent, and at the hearing the action was settled upon the terms (inter alia) that the husband (the defendant in the action and respondent on this application) should pay all the wife's costs.

In the bill of costs there were included two items of 5*l*. and 8*l*., the first being the amount of a deposit as security for costs of discovery in the action by production of documents under Rules of the Supreme Court, 1883, Order XXXI., rr. 25, 26; and the second being the amount of a like deposit in respect of discovery by interrogatories under the same rules.

These items were disallowed by the taxing master. The applicants delivered objections in which they stated as to the first item as follows: "This was paid by us out of our own pocket. We had not received anything from our client; we have not charged an attendance for obtaining the money, and therefore, being a payment out of pocket, it should be allowed on a solicitor and client taxation." To the objection the taxing master answered as follows: "This deposit cannot be allowed as the solicitors can obtain the return of it."

In reference to the other item a similar objection was made, and a similar answer given.

The summons was heard before Kekewich J. on July 2, 1902.

E. E. Humphrys, for the applicants. These deposits were disbursements within s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and as such properly included in the bill, and they ought to be allowed on taxation. They were payments made by the solicitors in pursuance of a professional duty undertaken by them, and which they were bound to perform, and are therefore disbursements within the principle laid down in *In re Remnant* (1), which is the leading case on the subject. That case was recently approved by the Court of Appeal in *In re Kingdon & Wilson* (2), overruling the decision in *In re Lamb* (3), that probate duty is a disbursement. In *In re Metcalfe* (4) counsel's fees and stamps were held to be properly included in a solicitor's bill, in view of the "one-sixth" rule as to costs of taxation.

Hansell, for the respondent. A deposit of this kind is not a disbursement. In its inception it is a sum paid by the solicitor as agent, and which in due course he is entitled to have repaid to him under Order XXXI., r. 27. It is a sum of money paid into court, and essentially different from a sum paid over to third persons, whether to the officials of the Court, as in the case of Court fees, or to counsel or solicitor. It is therefore not a disbursement within the Act. *In re Remnant* (1) shews that the only items which ought to be included in a bill of costs as disbursements are payments which the solicitor is bound to make, and these deposits were sums which the solicitors were not bound to find out of their own pockets.

KEKEWICH J. I always differ from a taxing master with the greatest possible hesitation, for the simple reason that it is his business to tax bills, and he is very much more likely to know that business than I am. But in this case the taxing master has given me a reason for his conclusion, and that naturally

(1) (1849) 11 Beav. 603.
(2) Ante, p. 242.
(3) (1889) 23 Q. B. D. 5.
(4) (1862) 30 Beav. 406.

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invites me to look at the reason, and see whether it is a good one. Before going to that I may observe that he does not give me any statement of the practice of the office on the point. If he had said that it was not the practice to allow a payment of this kind, I should have inquired into it, and asked for a certificate of the taxing masters as to their practice. Here the taxing master disallows each of these payments "as the solicitor can obtain the return of it." That is the only reason he gives. I think that reason is not a good one. It may be difficult to find an analogous case of a payment which ought to be allowed, and yet which can be returned to the solicitor on application. But I do not think that is material, nor is it material to consider the rules touching the repayment of the money with the client's authority. What is much more important is the character in which the solicitor makes the payment. The guiding rule is to be found in the case of *In re Remnant* (1), and it is not the less valuable either because it has antiquity, being a decision of Lord Langdale, or because it has been approved by the Court of Appeal in the recent case of *In re Kingdon & Wilson* (2), to which I have been referred. Lord Langdale speaks of the payment which the solicitor in the discharge of his professional duty is bound to make. During the course of the argument I spoke of negligence on the part of a solicitor for which he would be responsible in an action. But it is not necessary to go into that. What I understand Lord Langdale to mean is that it is sufficient that the solicitor is bound in the due discharge of the duty which he has undertaken as a solicitor, and in mentioning what sum was to be allowed he drew a distinction between the solicitor and the agent. We know solicitors very often act as agents for their clients. Cases come before the Court in which clients make their solicitors their bankers; but it could not be suggested that a disbursement by a solicitor in that capacity could be brought into a bill of costs. He makes it as agent; he is not acting as solicitor; the agency arises out of the professional relation, but he does not act in his professional character. If he acts as solicitor in making a payment, then it comes within his duty

(1) 11 Beav. 603. (2) Ante, p. 242.

and is a disbursement. I cannot see any distinction between these sums—that is to say, the 5*l.* which was paid as a deposit in the one instance and the 8*l.* which was so paid in the other instance—and sums paid by a solicitor on filing an affidavit or otherwise for stamps or counsel's fees. They are all alike payments which the solicitor is bound to make in the course of litigation, and they all fall under the same rule. It would be extremely inconvenient if I were to adopt the taxing master's conclusion, for, if a solicitor is not bound to act in the way I have mentioned, the result will be that whenever an affidavit is applied for there will be delay, because the solicitor is not under any liability to make the required payment. It seems to me that a payment of this kind, at least on the Chancery side, is an almost necessary element or step in litigation, and that it is as necessary as any other payment which the solicitor has to make. I must therefore send the bill back to the master for review, with an expression of my opinion to that effect.

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The client appealed. The appeal was heard on July 24, 1902.

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Hansell, for the appellant.
E. E. Humphrys, for the solicitors.

The arguments adduced in the Court below were repeated, and the same cases were cited.

VAUGHAN WILLIAMS L.J. In my opinion, these payments, which were really payments into court by way of security for part of the costs of the action, ought to have been entered in the solicitors' cash account, and not in their bill of costs as "disbursements." In so holding we shall, in my view, be simply applying the rule which was laid down in *In re Remnant* (1), and which it is admitted must govern this case. Looking at the certificate which was given by the Chancery taxing masters which is set out in the report of *In re Remnant* (2), I think these payments do not come within the rule stated by the masters. In my opinion, these payments were not

(1) 11 Beav. 603. (2) 11 Beav. 611–13.

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payments which the solicitors were "either by law bound to make, or by custom looked upon as the persons to make," on behalf of their client. The solicitors did in fact find the money to make the payments into court as required by the rules, but the money was simply lent by them to their client. I think the appeal should be allowed.

ROMER L.J. I am of the same opinion; but, as we are differing from the learned judge, I will add a few words. To my mind, these payments cannot be distinguished in principle from any sum which a person is ordered to pay into court to enable him to proceed with his action. Take, for instance, a case in which a party who is out of the jurisdiction is ordered to pay money into court as security for costs. In such a case the solicitor would not be bound to find the money; but, if he did find it, whose money would the sum paid into court be? Clearly the money of the client. It would be a loan from the solicitor to the client, and ought to be entered in the cash account, and not to be treated as a "disbursement." The payment would not be one which the solicitor was "by law bound to make, or by custom looked upon as the person to make," for his client. These payments are not like those mentioned in *In re Remnant* (1), which when once paid will never come back; they will, if the client is successful in the action, be returned to him. The suggestion that if the solicitors had not made these payments for their client they would have been liable for negligence is not well founded. They could have informed their client that the payments had to be made, and asked him to provide the money to enable them to take the proper steps in the action; and if he did not find the money, the solicitors could not be held guilty of negligence if they did not take those steps.

Solicitors: *Cameron, Kemm & Co.; J. C. Buckwell & Berkeley, Brighton.*

(1) 11 Beav. 603.

W. L. C.

In re CREDIT ASSURANCE AND GUARANTEE CORPORATION, LIMITED.

C. A. 1902 July 30.

Company—Reduction of Capital—Petition for Confirmation — Losses to be borne equally or rateably in Proportion to Capital paid up on Shares—Shares of the same Class with Different Amounts paid—Article providing for Division of Capital in Winding-up—Jurisdiction to sanction equitable Scheme—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 11.

There is no rule that where the articles of association of a company provide that, in the case of a winding-up, losses are to be borne by the members in proportion to the capital paid up on their shares, the same principle must be applied in the case of any reduction of capital as between shares in the same class with different amounts paid up. The Court has jurisdiction, after providing for the protection of creditors, to sanction any scheme which is not unjust or inequitable.

Decision of Farwell J., ante, p. 178, reversed.

APPEAL from a decision of Farwell J. (1)

The Credit Assurance and Guarantee Corporation, Limited, was incorporated in 1897 with a capital of 1,000,000*l.* divided into 2000 deferred shares of 1*l.* each and 99,800 ordinary shares of 10*l.* each.

The memorandum of association of the company provided that the profits should be applied in the first place in forming one or more reserve or sinking funds. These funds were to be applied for the purposes for which they were set aside, and subject thereto were to belong as to one moiety to the holders of deferred shares, and as to the other moiety to the holders of ordinary shares, but were not to be divided except by special resolution. Subject to this provision, profits were to be applied in paying a dividend at the rate of 10 per cent. per annum on the amount paid up for the time being; one half of the surplus was to be paid to the holders of deferred shares; and the other half, subject to payment thereout of extra remuneration to the directors, to the ordinary shareholders. All net profits divisible amongst the holders of deferred and ordinary shares respectively, and all other sums of money (if any) which might at any time become divisible amongst them, were to be divided

(1) Ante, p. 178.

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amongst the holders of each such class of shares pro ratâ according to the amount paid up thereon for the time being.

The articles of association gave the company power to reduce its capital, and contained the following articles: "152. If the corporation shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." "153. In any winding-up of the corporation the holders of deferred shares shall be entitled (as between themselves and the holders of ordinary shares) to one moiety of any assets of the corporation remaining after the payment and discharge of the debts and liabilities of the corporation, and the repayment to the holders of deferred shares and ordinary shares of the amount paid up or credited as paid up on such shares, together with the costs of the winding-up."

The 2000 deferred shares had been issued, as fully paid, to the subscribers of the memorandum of association in consideration of their underwriting a part of the capital. Of the ordinary shares 37,712 had been issued, on 1123 of which 5*l.*, and on the remainder 2*l.*, had been paid up; 2621 shares had been forfeited, but no question arose as to them.

The company sustained losses, and on December 12, 1901, passed a special resolution, which was afterwards duly confirmed, "that the capital of the company be reduced to 850,300*l.* divided into 99,800 ordinary shares of 8*l.* 10*s.* each and 2000 deferred shares of 1*l.* each, and that such reduction be effected by cancelling capital to the extent of 1*l.* 10*s.* in respect of each of the ordinary shares which have been issued and are now outstanding, and by reducing the nominal amount of all the ordinary shares in the company's capital from 10*l.* to 8*l.* 10*s.*," but such reduction to be without prejudice to the company's right to recover calls.

A petition by the company for the confirmation of the reduction was dismissed by Farwell J. on the ground that the losses ought to be borne rateably in proportion to the amount of capital paid up.

The company appealed, and the appeal by special leave was inserted in the interlocutory list.

Younger, K.C., and *Cozens-Hardy*, for the appellants. Owing to the small amount in question on the deferred shares, that point has been dropped; but the substantial ground of the appeal is this—that, if the losses are borne rateably in proportion to the amount of capital paid up on the shares, inequality and injustice will be produced, and the shareholders who had paid up 5*l.* before the reduction will be permanently penalized. The scheme proposed by the resolution will give all shareholders equal rights in the event of a winding-up, although for the moment it will affect the right to profits.

It is not proposed to reduce the liability on the shares or to affect the rights of creditors. There is no case in which losses of paid-up capital have, as between shareholders of the same class, been borne otherwise than equally.

[ROMER L.J. There is a great deal to be said in favour of bearing the losses rateably; but it is very inconvenient and may cause great injustice. For instance, if there were 10*l.* shares and one shareholder had paid 10*l.* and another had paid 5*l.*, and a loss of 3*l.* occurred. If that loss were borne in the proportion of 2 to 1, the first man's share would become an 8*l.* share, and the second man's share when he had paid it up in full would be a 9*l.* share, although he had only paid the same as the first man.]

That would apply to this case, and would produce inequality. The articles of this company are peculiar, and the proposed reduction will work fairly.

Farwell J. considered that he was bound by the decision in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1) to look at the reduction as if it were a liquidation and as if art. 152 applied. But this is a going concern, and the Court has a

(1) (1886) 34 Ch. D. 287, 299.

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discretion on the subject: *In re Direct Spanish Telegraph Co.* (1); and it has jurisdiction to sanction any scheme which is not unjust or inequitable: *British and American Trustee and Finance Corporation* v. *Couper.* (2)

[VAUGHAN WILLIAMS L.J. The chief duty of the Court is to see that the rights of creditors are protected.]

C. E. E. Jenkins, K.C., and *Martelli*, for the shareholders who were the only opponents to the scheme, said that if the Court thought that the scheme was a fair one they would withdraw their opposition. They did not dispute the jurisdiction.

VAUGHAN WILLIAMS L.J. If we are once satisfied that the proposed scheme will work no injustice, *British and American Trustee and Finance Corporation* v. *Couper* (3) is clear authority for saying that we have jurisdiction to sanction it; and in our discretion we do sanction it. Lord Herschell L.C. (4) says: "There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it."

This scheme as proposed will not in our judgment work inequitably or unjustly, and, that being so, we are of opinion, and indeed it is admitted, that we have jurisdiction to sanction it. In a case like this there must very often be something in the scheme which will not leave the rights of the parties just the same as before. But substantially this scheme alters them as little as possible; and under these circumstances the appeal will be allowed.

ROMER and MATHEW L.JJ. concurred.

Solicitors: *Davidson & Morriss; R. Chapman.*

(1) (1886) 34 Ch. D. 307.
(2) [1894] A. C. 399, 405.
(3) [1894] A. C. 399.
(4) Ibid. 406.

H. C. R.

In re FORD.
FORD *v.* FORD.

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Aug. 6, 7.

[1901 F. 135.]

Intestacy—Administration—Will becoming inoperative—Death of Sole Legatee and Executrix—Hotchpot—Statute of Distributions, 1671 (22 & 23 *Car.* 2, *c.* 10), *s.* 5.

The provisions of s. 5 of the Statute of Distributions, directing advancements made by an intestate in his lifetime by portions to his children to be brought into account in the administration of his estate, apply to an intestacy occasioned by a will becoming wholly inoperative in consequence of the death of the sole executrix and legatee in the lifetime of the testator, as well as to an intestacy occasioned by the non-existence of any will.

Decision of Buckley J., [1902] 1 Ch. 218, affirmed.

APPEAL from the decision of Buckley J. (1)

The question was, whether the hotchpot provisions of s. 5 of the Statute of Distributions applied to an intestacy which arose thus. The intestate had executed a will, by which he gave the whole of his property to his wife absolutely, and appointed her sole executrix. She died in his lifetime. He had during his life made advances to some of his children. Buckley J. held that s. 5 applied, and that the advances made to the children must be brought into account in the administration of the estate, and he directed an inquiry to ascertain the amounts of the advances.

The children who had received advances appealed.

H. Terrell, K.C., and *J. G. Wood*, for the appellants, repeated the arguments which they adduced in the Court below, citing the same cases.

Astbury, K.C., and *Gatey*, for the administrators, and

Ingpen, K.C., and *Brodie Cooper*, for a child who had not been advanced, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must fail. The deceased made a will by which he appointed his

(1) [1902] 1 Ch. 218.

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wife his sole executrix and gave all his property to her. She died in his lifetime, and the result was that there was no one in whose favour the will could operate. The will became entirely inoperative, for there was no one who could take any benefit under it. It is not true to say that the deceased did not die intestate. He did die intestate, and therefore the statute applies.

ROMER L.J. and MATHEW L.J. concurred.

Solicitors: *Ford & Co.; Rowcliffes, Rawle & Co.; Carr, Scott, Smith & Gorringe.*

W. L. C.

BYRNE J. 1902 *July* 1, 7.

DELVES *v.* GRAY.

[1902 D. 506.]

Vendor and Purchaser—Sale by Trustees—Repurchase by one Trustee—Executory Contract—Specific Performance—Damages—Breach of Trust—Purchaser's Nominee.

Trustees contracted to sell real estate to the defendant for 800*l*. Before the date fixed for completion, the defendant contracted to resell the same property to D., one of the trustees, at the same price, and required the conveyance to be made to D. as sub-purchaser, or as his nominee. D. subsequently declined to complete. In an action by the trustees for specific performance by the defendant of the first contract, the only defence was a counter-claim by the defendant for specific performance by D. of the second contract, or damages for the breach thereof:—

Held, applying the dictum of Mellish L.J. in *Parker* v. *McKenna*, (1874) L. R. 10 Ch. at p. 125, that so long as the first contract was executory only, the defendant having neither paid his purchase-money nor taken up his conveyance, the trustee, D., could not repurchase the property from his own purchaser, and the counter-claim could not be enforced; neither was the defendant entitled to damages, as he must be deemed to have known that D. was incapable of purchasing under the circumstances.

Though a purchaser may, as a general rule, require a conveyance to a nominee, he cannot require a conveyance to one of the vendors under circumstances which may expose them to the risk of being parties to a breach of trust.

ACTION.

This was an action by two trustees for specific performance of a contract for sale by a purchaser, to which the only defence

was a counter-claim by the purchaser against one of the vendors for specific performance of a subsequent contract to repurchase the property included in the first contract, as sub-purchaser, the main question being, whether the second contract was under the circumstances a binding one. The material facts as proved by the documentary and oral evidence were shortly as follows :—

The plaintiffs, David Delves and Edward Catchpole, were trustees for the purposes of the Settled Land Acts, 1882 to 1890, and in exercise of the powers of a tenant for life on behalf of one William Bassett, an infant, and in pursuance of an order of the Chancery Division, they, in January, 1902, put up for sale by auction a copyhold messuage and premises known as "Mount View," situate at Frant, in the county of Sussex. The defendant George Gray was the highest bidder at the auction, and by an agreement in writing of January 17, 1902, the defendant agreed to purchase this property from the plaintiffs for 800*l.*, and to complete the purchase on February 28, 1902. A deposit of 80*l.* was paid by the defendant on or before the signing of this agreement. An abstract of the plaintiffs' title was delivered in due course to the defendant; the title was investigated and accepted, and a conveyance was prepared and engrossed. In the meantime the defendant, having ascertained that there would be a heavy fine payable on admission, and that enfranchisement would be very expensive, regretted his purchase, and persuaded the plaintiff Delves to buy the property from him at the same price and on the same terms and conditions, the defendant at the same time arranging to lend Delves a very considerable proportion of the purchase-money, namely, 700*l.*, on mortgage of the property at 4 per cent. The written agreement between the defendant and Delves for this sub-sale was dated February 17, 1902. The defendant then wrote to the plaintiffs' solicitors, and required the conveyance to be made to Delves as sub-purchaser, claiming the right to have the sub-purchaser's name substituted for his own in the conveyance as his nominee. The plaintiffs declined to accept Delves as purchaser in substitution for the defendant, or to convey the property to Delves, or a nominee

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for him. Delves also subsequently declined to allow his name to be inserted in the conveyance, alleging that he had entered into the second contract under a mistaken idea of his duties as trustee.

As the defendant refused to accept a conveyance of the property from the plaintiffs, the present action was brought against him claiming specific performance of the contract of January 17, 1902. The only defence to this action was a counter-claim by the defendant for specific performance of the contract of February 17, 1902, or damages for the breach thereof.

The action was tried with witnesses, the plaintiff Delves and the defendant being examined and cross-examined, with the result stated in the judgment so far as the second contract is concerned.

Levett, K.C., and *W. A. Jolly*, for the plaintiffs. The claim made against the plaintiff Delves by the defendant for specific performance of the second contract cannot be enforced. During the existence of the contract for sale by the trustees, as vendors, one of the trustees could not himself enter into a binding contract for the purchase of the trust property; the contract being executory, Delves could not repurchase the property from his own purchaser: that seems plain from the observations of Mellish L.J. in *Parker* v. *McKenna* (1), and also from *Williams* v. *Scott*. (2) A contract involving a breach of trust cannot be enforced by specific performance: *Dunn* v. *Flood*. (3) Delves had no right to step into the defendant's place as purchaser; and, now that he has been properly advised, he is justified in refusing to complete a contract which he entered into under a mistaken idea of his position as trustee. The counter-claim, therefore, fails, and should be dismissed. The counter-claim once disposed of, the action is practically an undefended one.

Norton, K.C., and *Hon. M. M. Macnaghten*, for the defendant. Apart from any question of contract, a purchaser is entitled to have a conveyance either to himself or a nominee.

(1) L. R. 10 Ch. 96, 125. (2) [1900] A. C. 499, 507.
(3) (1885) 28 Ch. D. 586.

The plaintiffs in this case decline to convey to any nominee, which they have no right to do. There is no general rule that a trustee for sale cannot be a purchaser, though any trustee purchasing trust property, except with the sanction of the Court, is liable to have the purchase set aside if the cestui que trust chooses to say within reasonable time that he is not satisfied: *Campbell* v. *Walker*. (1) A trustee, therefore, can buy, but he cannot hold any profit he may make by a resale as against his cestui que trust, and a cestui que trust can have the property put up again if he chooses: *Ex parte Hughes* (2); *Ex parte Lacey* (3); *Lister* v. *Lister*. (4) A trustee can enter into a binding contract to purchase because he is not under an incapacity to buy, but an incapacity to hold his purchase against the cestui que trust if the sale is attacked. The second contract can, therefore, be enforced; at the utmost it is only voidable, not void: *Beningfield* v. *Baxter*. (5) The defendant, therefore, is entitled to specific performance against Delves, leaving him to bear the risk of having the question reopened by the infant. An order for specific performance against him would be sufficient protection. The observations of Mellish L.J. in *Parker* v. *McKenna* (6), relied on by the plaintiffs, are not applicable to the present case, where there is a bonâ fide contract to purchase at the same price. It is not a case of a trustee adopting for his own benefit an executory contract, as in *Williams* v. *Scott*. (7) The only defence to the counterclaim for specific performance is that Delves, by completing, may run some risk of a possible action by the infant to reopen the purchase; and if, through personal incapacity of this kind, Delves cannot complete, then the defendant is entitled to damages.

Levett, K.C., in reply. As a general rule a purchaser is entitled to have a conveyance to his nominee, but it must be a proper nominee, not one who is under disability. Delves is not liable for damages; the defendant knew all the time that

(1) (1800) 5 Ves. 678; 5 R. R. 135.
(2) (1802) 6 Ves. 617; 6 R. R. 1.
(3) (1802) 6 Ves. 625; 6 R. R. 9.
(4) (1802) 6 Ves. 631.
(5) (1886) 12 App. Cas. 167.
(6) L. R. 10 Ch. 96, 125.
(7) [1900] A. C. 499, 507.

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he was reselling to one of the trustees, who in law was incapable of purchasing.

Cur. adv. vult.

July 7. BYRNE J. For the purposes of the present case it does not appear to me to be material to consider whether or not the position of a trustee for sale in reference to the purchase of the trust property is defined with absolute logical accuracy in the phrase most frequently used, namely, that a trustee for sale cannot purchase trust property from himself, or from himself and his co-trustee or co-trustees, because I find a sufficient statement of the law applicable to the circumstances of the present case in the judgment of Mellish L.J. in *Parker* v. *McKenna* (1), where he says: "In my opinion, as long as the contract remains executory, and the trustee or agent has power either to enforce it or rescind or alter it, as long as it remains in that state he cannot repurchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account"; and, again, in the judgment of the Privy Council in *Williams* v. *Scott* (2), the material portion of which is as follows: "So long as the contract with John was executory only, and John had neither paid his purchase-money nor taken up his conveyance, and the trustees who were vendors had power either to enforce or rescind or alter the contract, it was not competent for David Austin"—he was one of the trustees in that case—"to step into John Austin's place, or take over John Austin's contract for his own benefit: see *Parker* v. *McKenna*." (3)

[After shortly stating the nature of the action and the counter-claim, his Lordship continued:—]

The matter still rests in contract, because the purchaser refuses to accept a proper assurance from the plaintiffs, and claims the right to have the name of the plaintiff Delves substituted for his own. There is no answer to the action unless the defendant can establish his counter-claim. It

(1) L. R. 10 Ch. 125. (2) [1900] A. C. 499, 507.
(3) L. R. 10 Ch. 96.

appears from the evidence of the defendant that, after he had agreed to purchase, he found out that there would be a fine payable on admission considerable in proportion to the value of the property, and that enfranchisement would be very expensive, and he persuaded the plaintiff Delves to enter into a contract to purchase from him at the same price and on the same terms, except that a very considerable proportion of the purchase-money was to remain on mortgage at 4 per cent.

There is no mistake as to the meaning and intention of the second transaction. The defendant Gray said in the course of his cross-examination, "My idea was that I was to lend Delves 700*l.* and he was to take my place." Delves acted in good faith, but he was properly advised by his solicitors that, being a trustee, he could not purchase the trust property, and he subsequently declined to allow his name to be inserted in the assurance as purchaser instead of Gray.

I think that Gray is bound to complete his contract, and judgment must go against him in the action. He is not in a position to enforce specific performance against Delves, not being able to confer upon him a marketable title. Nor is he entitled to damages. In law he must be deemed to have known that Delves was incapable of purchasing under the circumstances.

It was suggested that, independently of the contract, Gray, as purchaser, was entitled to have the name of Delves inserted in the assurance as his nominee, acting on the general practice that a purchaser may, in ordinary cases, take a conveyance to a nominee for himself; but I know of no principle or authority which compels vendors to convey to one of their own number, who declines to accept the nomination, under circumstances which may certainly expose them to the risk of the suggestion of being parties to a breach of trust hereafter.

The counter-claim must be dismissed with costs.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for W. C. Cripps, Son & Daish, Tunbridge Wells; Collyer-Bristow, Hill, Curtis & Dods, for Stone, Simpson & Mason, Tunbridge Wells.*

W. C. D.

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July 9, 15.

HOLLOWAY BROTHERS, LIMITED *v.* HILL.

[1902 H. 1130.]

Lease—Restrictive Covenant—Covenant by Lessor not to carry on or permit a particular Trade on adjoining Premises—Lessee—Assigns—Injunction.

The lessee of a person bound by a restrictive covenant can be sued whether "assigns" are mentioned in the covenant or not.

In a lease by H. to the plaintiff company, the lessor covenanted that he, his heirs, executors, administrators, and assigns, would not carry on, or permit to be carried on by others, in certain named shops the business of a tailor; H. subsequently demised one of the shops to B. for a tailoring business. In an action by the plaintiff company against H. and B. for an injunction to restrain H. from permitting, and B. from carrying on, this business:—

Held, on the construction of the covenant, that the mention of assigns, without mentioning lessees, afforded no ground, standing alone, for holding that the covenant was not binding upon B.; that though "lessees" were not mentioned eo nomine, the words of the covenant were sufficient to bind B. not to carry on the particular business referred to, and that an injunction ought to be granted.

Bryant v. *Hancock & Co.*, [1898] 1 Q. B. 716, distinguished.

The decision in *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974, is not inconsistent with that of *Fitz* v. *Iles*, [1893] 1 Ch. 77.

ACTION.

The only question raised at the trial of this action which calls for any notice in this report was the liability of a lessee under restrictive covenants entered into by his lessor with a third person. The facts, so far as material, were as follows:—

The defendant John Charles Hill was the owner of certain premises known as Nos. 41, 42, 43, and 50, Grand Parade, Tottenham, Middlesex, forming part of a block of shops recently erected by him. By a lease of September 10, 1901, the premises Nos. 41, 42, and 43, Grand Parade were demised by the defendant Hill to the plaintiff company for a term of twenty-one years from June 24, 1901 (determinable at the option of the lessees at the end of the first seven or fourteen years), at the rent of 410*l.* per annum. The lease contained a covenant by the lessees that they would not, without the licence of the lessor first had and obtained, use the said

premises or permit the same to be used for any trade or business save and except that of a tailor, clothier, and general outfitter, but such trade was not to include the sale or dealing in boots and shoes. The lease also contained a covenant by the defendant Hill for himself, his heirs, executors, administrators, and assigns with the plaintiff company, their successors and assigns, that he, the lessor, his heirs, executors, administrators, and assigns, should not nor would during the first ten years of the continuance of the term thereby granted carry on by himself, or suffer to be carried on by others, in or upon (inter alia) the premises No. 50, Grand Parade aforesaid, or any part thereof, the trade or business of a general clothier and tailor for men and boys; and further that if and in case the aforesaid premises should at any time during the continuance of the said term of ten years be sold, conveyed, or otherwise disposed of, or should be contracted to be sold, conveyed, or otherwise disposed of by the lessor, or the legal estate therein or any part thereof should pass to or be or become vested in any other person or persons whomsoever, whether by will or intestacy of the lessor or otherwise, the aforesaid covenant on the part of the lessor should be operative and binding as well on any purchaser or purchasers, person or persons, in whom during the aforesaid period of ten years the legal estate in the aforesaid premises should be or become vested, as on the executors, administrators, and assigns of such purchaser or purchasers, person or persons aforesaid. The plaintiff company entered into possession of the premises 41, 42, and 43, Grand Parade, under the said lease, and carried on therein the trade or business of general clothiers and tailors.

By a lease of March 10, 1902, the defendant Hill demised the premises No. 50, Grand Parade to the defendants, Messrs. Berrick Brothers, tailors; the lease contained a covenant by these defendants not to use the same premises, or permit the same to be used, for any trade or business save and except that of a tailor without the consent of the lessor. This lease was granted in the belief, as the defendant Hill alleged, that the plaintiff company had no objection to a strictly tailoring business being carried on in these premises. It turned out,

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however, that the defendant Hill was mistaken on this point; and on April 10, 1902, the present action was commenced against Hill and Messrs. Berrick Brothers, claiming an injunction to restrain the defendants Berrick Brothers from carrying on, and the defendant Hill from permitting or suffering to be carried on, upon the said premises, No. 50, Grand Parade, the trade or business of a tailor for men and boys during the first ten years of the continuance of the term granted by the lease of September, 1901.

So far as the defendant Hill was concerned, the action was practically an undefended one; some attempt was made to shew that the business of the defendants Berrick Brothers was different from the business carried on by the plaintiff company, and did not interfere or compete with it; but the substantial defence on behalf of Messrs. Berrick Brothers was one of law, it being contended that they were not the assigns of the defendant Hill within the meaning of that expression as used in the covenant, and that they took their lease without any notice of this covenant either actual or implied, though their evidence failed to satisfy the Court on the question of actual notice.

Levett, K.C., and *G. R. Northcote*, for the plaintiff company. So far as the defendant Hill is concerned, the action cannot be defended: he is clearly permitting this business to be carried on; and against him we only ask for a declaration establishing our right. As to the defendants Berrick Brothers, they are the "assigns" of the defendant Hill and are within the express wording of the covenant in the lease of September, 1901; but in any case the plaintiffs are the persons entitled in equity to the benefit of this covenant, and can enforce it against any person bound in equity by notice of it, either express or implied. One lessee can sue another lessee of the same lessor to enforce a restrictive covenant: *Fitz* v. *Iles*. (1)

[BYRNE J. referred to *Ashby* v. *Wilson*. (2)]

It was intended to impose a positive restriction on the user of these premises, and the covenant is in the form referred to

(1) [1893] 1 Ch. 77. (2) [1900] 1 Ch. 66.

by James L.J. in *Kemp* v. *Bird* (1) as appropriate for this purpose.

Rowden, K.C., and *Quin*, for the defendant Hill.

Norton, K.C., and *M. Romer*, for the defendants Berrick Brothers. These defendants are not bound as Hill's "assigns," *Bryant* v. *Hancock & Co.* (2), which expressly decides that underlessees are not assigns; the lessee takes by demise, and not by assignment. Here the lessor covenants for his "assigns," and on the construction of this covenant "lessees" were never meant to be included. We took this lease without any actual notice of this restrictive covenant: notice cannot be implied in this case. Prior to the Conveyancing Act, 1882, the lessee had notice of his lessor's title, but that was only constructive notice, *Patman* v. *Harland* (3), which was before that Act. Constructive notice is abolished by the Conveyancing Act, 1882, s. 3, except in certain cases where it is unreasonable not to inquire, and now the lessee cannot inquire into his lessor's title. It is true that by s. 3 of the Conveyancing Act, 1882, notice of restrictive covenants is in certain cases still reserved, but only when these covenants appear on the title-deeds of the property sold: in this case the restrictive covenant is not on the title-deeds of any property sold; it is in the lease of other property, so that no searches into the title-deeds of our house would ever have disclosed this covenant.

Levett, K.C., in reply. A lessee is an assign for the term of the lease within the meaning of a covenant of this nature. *Bryant* v. *Hancock & Co.* (2) when examined only amounts to a decision that a lessee was not liable in damages for the acts of his underlessee. The plaintiffs' right under the equitable doctrine of this Court does not depend upon the existence of a covenant running with the land, or upon the existence of any right to relief under the common law: *Tulk* v. *Moxhay*. (4) The evidence shews that the defendants Berrick Brothers had actual notice, either directly or through their agent, of this covenant.

Cur. adv. vult.

(1) 5 Ch. D. 974.
(2) [1898] 1 Q. B. 716.
(3) (1881) 17 Ch. D. 353.
(4) (1848) 2 Ph. 774.

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July 15. BYRNE J., after reading the covenant by the lessor in the lease of September, 1901, and shortly stating the facts, continued:—It is admitted that the business of Berrick Brothers, though not one for the sale of ready-made clothes, is within the terms of the covenant by the lessor in the lease by him to the plaintiff company. There was some attempt made to shew consent on the part of the plaintiffs to the defendants Berrick Brothers carrying on the business of tailors; but this failed, as, apart from denial of the fact, there was no proof of authority to give consent on the part of the gentleman alleged to have given it. Against the defendant Hill no relief is asked at the bar beyond a declaration establishing the plaintiffs' right. The points insisted on by way of defence on behalf of the defendants Berrick Brothers were: (1.) That they are not liable to be sued, not being assigns of Hill within the meaning of that expression as used in the covenant; and (2.) that they took their lease without notice either actual or to be imputed to them. A negative bargain, that is a bargain against particular user of land retained, on sale or lease of part of an estate, may be enforced by any person entitled in equity to the benefit of the bargain against any person bound in equity by notice of it, either express or to be imputed at the time of acquisition of his own title. This is a right which may be enforced by virtue of the equitable doctrine applicable, and does not depend upon the existence of a covenant running with the land, or upon the existence of any right to relief under the common law: see the leading case of *Tulk* v. *Moxhay* (1); and see also *Johnstone* v. *Hall*. (2) The question in the present case is not whether or not the plaintiffs are entitled to the benefit of the bargain, but whether or not the defendants Berrick Brothers are bound, and liable to be sued in respect of it. Of course, if the covenant or agreement is so framed as to exclude any person, or class of persons, deriving title under the original covenantor from liability to the equity, it cannot be enforced against them, and it is urged that the covenant, being on behalf of the lessor, his heirs, executors, administrators, and assigns, his lessees are not bound, because "lessees" are not "assigns," and the

(1) 2 Ph. 774, 777. (2) (1856) 2 K. & J. 414, 420.

mention of assigns without mention of lessees shews that the latter are intended to be excluded. In support of this view a passage from the judgment of the Court in *Bryant* v. *Hancock & Co.* (1) was cited, which, however, only determined that, on the true construction of the covenant there under consideration, a lessee was not liable in damages for the acts of his underlessee, he having covenanted against acts of assigns not mentioning underlessees. The passage cited recognises the authority of *Taite* v. *Gosling* (2), where a lessee was held entitled to enforce a restrictive covenant as an assign of the covenantor.

I think that the authorities shew that the lessee of a person bound by a restrictive covenant may be sued, whether assigns are mentioned or not. In *Johnstone* v. *Hall* (3) there was a covenant by a lessee, for himself, his heirs, executors, administrators, and assigns, that he, his executors, administrators, and assigns would not (amongst other things) carry on, or suffer to be carried on, upon the premises, or in any edifice or building to be erected thereon . . . . any other manufacture, trade, business, or employment whatsoever, ... it being thereby expressly agreed that the premises should at all times thereafter be used and enjoyed solely as and for private dwelling-houses. The lessee's interest in the premises became vested in the defendant Hall, who underlet a house to the defendant Armstrong, who carried on a school there. Relief was refused to the plaintiffs on the ground that, as contingent remaindermen, they had not sufficient interest to entitle them to an injunction; but Wood V.-C., after dealing with the question of rights at law, says (4): "It does not, however, follow from the mere circumstance of the plaintiffs' being without remedy at law, that they are therefore without remedy in this Court. In other cases of this character a party who, owing to the peculiar doctrines of Courts of law, can have no relief at law, may be relieved in equity. This is especially the case with reference to the doctrine of Courts of law respecting covenants running with the land; and it is now quite settled—as was stated by

(1) [1898] 1 Q. B. 716, 719.
(2) (1879) 11 Ch. D. 273.
(3) 2 K. & J. 414.
(4) Ibid. 420.

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Knight Bruce L.J. in *Coles* v. *Sims* (1), referring to *Tulk* v. *Moxhay* (2), which he says was neither the first nor yet the last case in which it has been so held—that this Court does not feel itself embarrassed by the consideration whether a covenant does or does not run with the land, but looks upon it as a contract which, in either case, may afford a ground for relief. Here I am bound to consider the covenant as amounting to an agreement between the parties as to the user of the land, and the question is whether the case is such as entitles the plaintiffs, in their peculiar position as reversioners, to the relief prayed." And he also says (3): "My opinion is, that the plaintiffs, when they come into possession, may insist, if they think proper, on their right to have the same relief as was granted in *Kemp* v. *Sober* (4); but I must now dismiss their bill, with costs." There was no suggestion in that case that the action was not well constituted, or not maintainable, because the covenant was on behalf of assigns and against the acts of assigns, whereas the defendant carrying on the business was underlessee. In *Wilson* v. *Hart* (5) there was a covenant by the purchaser of part of a building estate for himself, his heirs, executors, and administrators, without mention of assigns, and an injunction was granted against a tenant from year to year. The form of the covenant was impersonal that no buildings should be used, &c.; but in *Feilden* v. *Slater* (6) a lessee was restrained, his lessor with others having entered into a joint and several covenant for themselves, their heirs, executors, and administrators, not mentioning assigns, with their grantors, their heirs, and assigns, that they would not use or occupy or permit to be used or occupied any of the buildings as an inn, public-house, or tap-room, or for the sale of spirituous liquors or ale or beer.

The case of *Kemp* v. *Bird* (7) was a case turning on the particular terms of the covenant, and in the Court of appeal, at the foot of page 976, James L.J. says: "If it had been intended that there should have been a positive restriction on the use of

(1) (1854) 5 D. M. & G. 1, 8.
(2) 11 Beav. 571; 2 Ph. 774.
(3) 2 K. & J. 425.
(4) (1851) 1 Sim. (N.S.) 517, 521.
(5) (1866) L. R. 1 Ch. 463.
(6) (1869) L. R. 7 Eq. 523.
(7) 5 Ch. D. 549, 974.

the premises during the term, there is a well-known form which the parties might have used, and which would have been binding on the owner, and on his representatives, and on the assignee—that is, 'that the said G. Bird, his heirs, executors, administrators, and assigns, shall not, during the said term, demise or let, or permit any of the said messuages or tenements to be demised or let,' and so on." *Ashby* v. *Wilson* (1) must also be read as turning on the special form of the covenant, as it only purports to follow *Kemp* v. *Bird* (2), which is said to be exactly in point, and moreover there had been no breach by the covenantor. *Fitz* v. *Iles* (3) was the case of a lessee suing another lessee, the lessor being joined as a co-defendant; and there North J. and the Court of Appeal granted an injunction, the form of the covenant not being, as in *Kemp* v. *Bird* (2), limited in terms so as to bind the lessor only, although it appears that there was a covenant by him, not mentioning heirs, executors, administrators, or assigns. There was a suggestion in *Ashby* v. *Wilson* (1) that *Kemp* v. *Bird* (2) is not reconcilable with *Fitz* v. *Iles* (3); but Kekewich J. did not decide that this is so, and I can see no inconsistency between the two cases. There was a suggestion that in *Fitz* v. *Iles* (3) the point was not taken that one lessee could not sue another without joining the landlord; but it is clear that the point was not overlooked: see per Lindley L.J. (4)

Whether or not the landlord is properly joined as a defendant in an action like the present may, I think, depend upon circumstances. In this case I think he is, as he has granted a lease allowing the carrying on of a tailor's business, and in any case he would be properly joined as interested in the question whether or not he had thereby acted within his rights. He has in fact defended this action, not upon the ground that the granting of the lease was not a breach of contract, but setting up a defence of assent on the part of the plaintiffs, which has failed. So far as the construction of the covenant is concerned, I am of opinion that the mention of assigns, without mention of lessees, affords no ground, standing alone, for holding that

(1) [1900] 1 Ch. 66.
(2) 5 Ch. D. 549.
(3) [1893] 1 Ch. 77.
(4) Ibid. 81.

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the covenant is not binding upon the defendants Berrick Brothers, and in other respects, though lessees are not mentioned eo nomine, I think that the words of the covenant are sufficient to bind them not to carry on the business referred to.

The remaining point is that of notice. It is conceded that under the law as it existed prior to the passing of the Conveyancing Act of 1882, the defendants Berrick Brothers would have been bound without actual notice, but it is said that they are protected by s. 3 of that Act. I do not think it necessary to decide anything more than this—that even if actual notice of the terms of the covenant has not been brought home to the defendants Berrick Brothers (and I am by no means satisfied that it has not, by fair inference from the evidence), most unquestionably these terms would have come to the knowledge of their agent, when negotiating for the house, had he made such inquiries as having regard to what he did know he ought reasonably to have made. The existence of some restrictive covenant was known, and he was entitled to inquire what were its terms.

The result, therefore, is that I think the plaintiff company have established their right to a declaration that the defendant Hill is not entitled to permit or suffer to be carried on upon the premises, No. 50, Grand Parade, the trade or business of a tailor for men and boys during the first ten years of the continuance of the term granted by the lease of September, 1901, and also to an injunction to restrain the defendants Berrick Brothers from carrying on such trade or business on the same premises during that period; the plaintiff company are also entitled to their costs.

Solicitors: *W. H. Hudson; Hammond & Richards; Harris, Chetham & Co.*

W. C. D.

In re THE REGISTERED TRADE-MARK No. 22,206 OF MAURICE JOHN HART.

BYRNE J.

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July 3, 4, 28.

Trade-mark—Registration for an entire Class—User for part of Class—Bonâ fide Intention to use—Dormant Mark—Rectification of Register—Limitation to part of Class—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 90.

Where a trader has registered a mark for an entire class, and, many years after registration, it is proved that he has never used the mark in connection with a particular article in that class, though his business included the sale of that article under other trade-marks, the register may be rectified, upon the application of another trader desiring to register a similar mark for the particular article, by excluding that article from the specification of goods in respect of which the mark was originally registered, on the ground that at the date of registration there had been no actual user of the mark, and no bonâ fide intention of using it for that particular article of the class for which the mark had been registered.

Principle of *Edwards* v. *Dennis*, (1885) 30 Ch. D. 454, applied.

MOTION.

This was an application under the Patents, Designs, and Trade Marks Act, 1883, s. 90, to rectify the register, which raised the question of expunging or limiting the use of dormant marks, that is trade-marks which have been for a long time upon the register, but have never been actually used for some of the articles specified in the class for which they have been registered. The facts, so far as material for the purposes of this report, were as follows:—

In October, 1880, Messrs. H. K. & F. B. Thurber & Co., dealers in canned goods, trade and food products, registered under the Trade Marks Registration Act, 1875, a trade-mark, 22,206, for the whole of the goods in class 42, that is for "substances used as food, or ingredients used in food." The trade-mark consisted of a conventional or geometrical quasi-floral device with the words "Red Rose." At the same time five other marks were similarly registered, all for goods in class 42, containing other devices and the words "Yellow Rose," "Tuberose," "White Rose," "Favourite," "Perfection," and "Lily of the Valley" respectively. Numerous transfers

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of these marks were made from time to time, and ultimately, in April, 1901, they were assigned to, and duly vested in, Maurice John Hart, who traded as Field & Co., and carried on a very similar business to that formerly carried on by Thurber & Co., and also dealt in condensed milk.

The Anglo-Swiss Condensed Milk Company, who dealt only in condensed milk in tins, had for about seventeen years past continuously used in connection with one quality of their goods a label with the words "Condensed Milk," the device of a red or pink rose with two buds and leaves after nature, and the words "Rose Brand," and they had advertised in their price-lists these goods under the denomination "Rose Brand." It appeared that some millions of tins had been sold with these labels. In September, 1901, the Anglo-Swiss Company applied to register the above mark in class 42 in respect of condensed milk, stating the essential particulars to be the device and the word "Rose," disclaiming any right to the exclusive use of the added matter, and stating that "the entry of the mark upon the register shall not affect the right of any owner of the name 'Rose' to the use of that name or the foreign equivalent thereof." The registrar declined to proceed with this registration without the consent of Maurice John Hart on the ground of the existence upon the register of the said mark 22,206. As Hart declined to consent, the Anglo-Swiss Company now applied under the Trade Marks Acts, 1883–1888, that the register of trade-marks might be rectified by expunging therefrom the above-mentioned trade-mark, No. 22,206, or, in the alternative, "by excluding condensed milk from the specification of goods in respect of which the same was registered." The motion was tried with witnesses, who were cross-examined on their affidavits made in support of the motion, with the result that the Court found as a fact that Hart's predecessors in title had used their "Rose" marks for a great many of the goods in class 42, and that they sold amongst other canned goods condensed milk; it was, however, admitted that they had never used the "Red Rose" mark in connection with condensed milk: it also appeared that besides selling condensed milk purchased with other marks upon

the tins, they used two marks of their own, "Favourite" (registered the same time as "Red Rose") and "Stag," in connection with this particular class of goods. M. J. Hart in his evidence stated that when he took the assignment of the trade-marks in April, 1901, he did so for the purpose (amongst others) and with the intention of putting upon the market a brand of condensed milk under Thurber's trade-marks, and he proved that he did actually negotiate for a supply of condensed milk, labelled with a label of Hart's design, or unlabelled, without extra charge at a date anterior to the receipt of a letter from the Anglo-Swiss Company of October, 1901, which he stated was the first notice he ever had of the user of the label it was now desired to register: he also deposed that as soon as satisfactory arrangements were completed, and this motion disposed of, he proposed to carry out his intention of selling condensed milk under the series of the "Rose" trade-marks. Another witness, who had been connected in business with the respective predecessors in title of Hart, gave evidence that he had no knowledge of the user by the Anglo-Swiss Company of their "Rose Brand" label until the beginning of November, 1901; but the Court considered that this might be attributable to the fact that the "Red Rose" mark was never used for condensed milk, so that competition did not arise.

Hart's title to the mark No. 22,206 was also attacked on the ground that he was not the original proprietor, and that there could not have been any valid assignment of this mark to him apart from the goodwill of the business in condensed milk, which the company alleged did not exist; but as an order to expunge was not insisted upon at the trial, the applicants being satisfied with a limitation of the user in the terms stated in the alternative part of that notice of motion, the dates of the various assignments and the arguments on this point are omitted.

Rowden, K.C., and *Sebastian*, for the Anglo-Swiss Company. There has never been any user by the respondent or his predecessors of the "Red Rose" mark upon condensed milk, and he cannot now claim the exclusive right to use this mark for

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every description of goods in class 42; the respondent's mark should therefore be limited to those articles in the class for which it has been actually used, on the principle of *Edwards* v. *Dennis* (1) and *Hargreave* v. *Freeman*. (2) There could not have been any bonâ fide intention of using this mark on condensed milk at the time it was registered; the applicants are therefore entitled on that ground to have the register rectified: *In re Batt & Co.'s Trade-marks* (3); *In re Suter, Hartmann, and Rahtjen's Composition Co.'s Trade-marks*. (4) The applicant is "a party aggrieved," for the trade-mark the company desires to have registered is kept off the register by reason of the presence on it of this mark, which has never been used for condensed milk. The respondent states in evidence that he means now to commence using this mark on condensed milk, and he will then unfairly obtain the benefit of the reputation of our "Rose Brand." We do not desire the respondent's mark to be expunged; we shall be satisfied if it can be limited so as to exclude its use on condensed milk. The principle of *Edwards* v. *Dennis* (1) applies.

R. J. Parker, for the comptroller. These dormant marks are a great incumbrance on the register and a great inconvenience to the public. The Trade Mark Acts never contemplated that there should be any marks on the register which were not in actual use. Having regard to *In re Batt & Co.'s Trade-marks* (3), there seems to be no reason why the mark should not be limited. If this is not done, one trader can lie by for twenty years, and then get the benefit of another trader's reputation. On these grounds the comptroller supports this application.

Levett, K.C., and *Griffith Jones*, for the respondent Hart. There is no reported case in which a trade-mark has been expunged, or limited to certain articles, when the business of the owner of the trade-mark includes dealings in the particular articles in respect of which the application to rectify is made. If it were found that Hart and his predecessors had never dealt in or sold condensed milk, or had never used this "Red Rose"

(1) 30 Ch. D. 454.
(2) [1891] 3 Ch. 39.
(3) [1898] 2 Ch. 432.
(4) (1901) 19 Rep. Pat. Cas. 42.

for some of the articles in class 42, then the application would be right; but Hart's predecessors have sold condensed milk, and have used the mark for many of the goods in class 42; on this ground *Edwards* v. *Dennis* (1) is not applicable, and the mark cannot be limited simply because it has not been used upon condensed milk. The original registration was bonâ fide made twenty years ago by a firm dealing in condensed milk; there has been bonâ fide user ever since for certain articles in class 42, other than condensed milk; and there has been a continuous sale of condensed milk all the time. There is a bonâ fide intention now to use the registered mark for condensed milk, and this intention was formed three months before Hart learned of the applicants' desire to register their trade-mark. The present case is entirely different from *In re Batt & Co.'s Trade-marks.* (2) The applicants to succeed must shew abandonment, and this is negatived by the evidence.

Rowden, K.C., in reply. The fact that Hart and his predecessors in title sold condensed milk without this mark and with other marks is evidence that there never was any bonâ fide intention of using this mark. It is not the policy of the Acts to favour these dormant marks.

Cur. adv. vult.

July 28. BYRNE J., after shortly stating the nature of the application and the result of the evidence, continued:—The circumstances of the present case differ from the circumstances in *Edwards* v. *Dennis* (1) in this respect—that the business, the goodwill whereof has been assigned to the respondent Hart, was a business which included the sale of condensed milk, whereas in *Edwards* v. *Dennis* (1) the business of the respondents did not include any dealing in the description of goods in respect of which the applicant sought to have the register rectified.

The first point for consideration is whether or not the principle applied in *Edwards* v. *Dennis* (1) ought to be acted upon in a case where the goods of a particular description in class 42 have been sold, but never in connection with the trade-

(1) 30 Ch. D. 454. (2) [1898] 2 Ch. 432.

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mark in question. It is, I think, clear on the facts, not only that there was no user of the mark in connection with condensed milk, but that there could not have been any immediate intention so to use the mark when it was originally registered. If there ever was any vague original intention of the kind (in support of which there is no evidence), it was not acted upon and was given up, as is shewn by non-user and subsequent user of other marks for the same description of goods. There is no such difference between the provisions of the Act of 1875, which was the Act considered in *Edwards* v. *Dennis* (1), and the provisions of the Acts now in force as to render that case inapplicable as an authority.

It follows that, notwithstanding the fact that after the expiration of five years from the date of registration such registration is conclusive evidence of right to the exclusive use of the mark, it does not preclude an application to remove, if it ought not originally to have been placed there. I have not to deal with a case where there has been some de facto user of the mark in respect of the particular goods, nor with a case where, a mark having been used in connection with certain goods, the business has been, or is about to be, extended to the sale of other goods within the class for which registration has been effected, and I can see that different considerations may well arise in varying circumstances; but, confining myself to the facts of the present case, first, registration of the mark for a whole class, then user of the mark for some goods in that class, sale of other goods in the same class for more than twenty years, always in connection with other marks and never in connection with the mark in question, I can only come to the conclusion that in respect of the last-named articles there never was at the time of registration any such intention to use the mark, as to bring the case within the principle requiring de facto user, or immediate intention to use the mark in connection with a particular description of goods at the time of registration, to entitle a man to be on the register in respect of such goods. I think that the case of *In re Batt & Co.'s Trade-marks* (2) supports the view I take.

(1) 30 Ch. D. 454. (2) [1898] 2 Ch. 432.

This renders it unnecessary to decide the question of abandonment, and I will only say that this must be a question of intention, as was pointed out by Chitty J. in *Mouson & Co.* v. *Boehm* (1), and I should feel great difficulty in holding that, where, as in the present case, the only user relied on, so far as concerns the particular goods, is that evidenced by the mark having been five years on the register, there has been no abandonment, when for more than fifteen years subsequent to such five years, and prior to the assignment to the respondent, there has been no user, but a sale of the description of goods with user of other and different marks. I think that the register ought to be amended by excluding condensed milk from the class of goods for which the mark stands on the register. I have not sufficient material before me to enable me to place any greater limitation upon the class, unless the respondent for his own protection against possible subsequent application desires it—in which case I will assist him. The respondent must pay the costs of this application and of the comptroller.

Solicitors: *McKenna & Co.; Newton G. Driver; Solicitor to the Board of Trade.*

(1) (1884) 26 Ch. D. 398.

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1902

May 7, 8, 9; *Aug.* 5.

WATTS *v.* BUCKNALL.

[1902 W. 166.]

Company—Prospectus—Omission of Material Contract—"Knowingly issue"—Waiver Clause—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

If a director leaves to others, without further inquiry, a statement in the prospectus that there are or may be other material contracts, without giving the particulars of the contracts, and wilfully—that is, with knowledge that he is doing so—abstains from inquiry, he cannot rely on his ignorance as a defence to an action under s. 38 of the Companies Act, 1867. A plea of ignorance on the part of a director can only be maintained where the facts enable him to establish a right to say that the prospectus is not a document for which he is responsible.

No protection is afforded to those responsible for the issue of a prospectus, under a waiver clause which they invite subscribers to submit themselves to, unless they fairly disclose what is the nature of the rights which they ask should be waived.

This was an action for damages brought against a director of the Worcestershire Brewing and Malting Company, Limited, upon the ground that the plaintiff applied for and received an allotment of shares in the company upon the faith of a prospectus which did not comply with s. 38 of the Companies Act, 1867, inasmuch as it did not disclose the dates and the names of the parties to certain contracts entered into prior to the issue of the prospectus.

The company was incorporated in December, 1896, for the purpose of acquiring two breweries known as Bucknall's Brewery and the Delph Brewery, together with licensed houses, plant, stock, book debts, shops, and land. In December, 1896, the prospectus of the company inviting persons to subscribe was issued. It stated that the capital of the company was divided into 13,000 5½ per cent. cumulative preference shares of 10*l.* each and 13,000 ordinary shares of 10*l.* each. It also offered for public subscription 230,000*l.* 4½ per cent. debenture stock. The prospectus, after specifying the objects of the company and describing the properties to be purchased, stated that the purchase price payable by the company had been fixed

at 440,000*l.*, in addition to which the company would pay for the stocks, stores, and book debts at a valuation in the usual way. Valuations of the properties were attached, and the prospectus also contained the following clauses: "The vendors (who promote the company and have acquired the properties to resell at a profit) pay the whole of the expenses of the formation and registration of the company (including the issue of the prospectus and brokerage) up to the first allotment of shares, except stamp duties and the legal charges of securing the debenture stock which will be paid by the company." "A contract for purchase has been entered into, being an agreement dated the 1st day of December, 1896, between Edward Stopford Claremont (who represents the vendors) of the one part and H. Broadbridge, as a trustee on behalf of the company, of the other part." "During the negotiations for the purchase of the properties and the formation of the company, contracts have been entered into between various parties, with reference to the formation and promotion of the company, and the subscription of its capital, but to none of which the company is a party. The businesses agreed to be purchased, or some of them, will be taken over subject to all existing contracts, which are of the ordinary trade character. The contracts referred to in this paragraph are, or may be, contracts within the meaning of the 38th section of the Companies Act, 1867; and, accordingly, applicants for shares are to be deemed to have notice of the said contracts, and to have agreed with the company (as trustee for the directors and other persons liable) to waive all claims, if any, against them for not more fully complying with the requirements of the said section, and allotments will only be made upon this express condition." The prospectus did not specify the dates of or the names of the parties to any of the contracts referred to in the last-mentioned paragraph.

The plaintiff, S. C. Watts, applied on the faith of the prospectus for twenty preference shares; they were allotted to him, and he paid 200*l.* for them. In January, 1902, he commenced this action, alleging that the shares had never had any value, and asking for compensation from the defendant. The

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plaintiff founded his action on the allegation that ten contracts by the promoters or their agents dated in 1895 and 1896 (of which he gave the dates and the names of the parties), material to persons who contemplated subscribing for shares in the company, had not been disclosed; that the prospectus to the knowledge of the defendant did not specify the dates of and the parties to these contracts; and that he (the plaintiff) had no knowledge of their existence.

The defendant was one of the directors, and took part in the preparation of the prospectus. By his defence he denied that the contracts were material; that he knew of the contracts or any of them; that the prospectus to his knowledge omitted to specify the dates of or the parties to the contracts; that he was aware of the contracts; and that the plaintiff had no notice of the existence of the contracts. He relied on the waiver clause; and, further, contended that the contracts did not require to be specified under s. 38.

At the trial the plaintiff succeeded in proving six of these contracts, which were of such a nature as to shew that the value of the properties to be purchased by the company had been very much exaggerated.

The effect of the defendant's evidence is stated in the judgment.

Norton, K.C., and *Joseph Ricardo*, for the plaintiff. These contracts are material; the defendant knew of their existence, and he intentionally issued the prospectus without specifying them; the prospectus must, therefore, be deemed fraudulent on his part under s. 38 of the Companies Act, 1867: *Twycross* v. *Grant* (1); *Sullivan* v. *Mitcalfe* (2); *Cackett* v. *Keswick* (3); *Baty* v. *Keswick*. (4) The defendant is not protected by the waiver clause. In order to make such a clause effectual as against a subscriber it must fairly disclose the circumstances which confer the rights which, by the clause, he agrees not to enforce: *Greenwood* v. *Leather Shod Wheel Co.* (5)

(1) (1877) 2 C. P. D. 469, 541, 542.
(2) (1880) 5 C. P. D. 455.
(3) Ante, p. 456; 71 L. J. (Ch.) 641.
(4) (1901) 85 L. T. 18.
(5) [1900] 1 Ch. 421.

The clause itself is misleading. It says that the contracts "are or may be" within s. 38, when the directors must have known that they were within the section.

The plaintiff relied on the prospectus, and is entitled to compensation.

Levett, K.C., *Rowden, K.C.*, and *Bremner*, for the defendant. The plaintiff did not rely on the prospectus, and he has not shewn that the omission of these contracts induced him to take shares. The prospectus told him that a profit was being made, and he made no inquiries about it.

This is not an action for deceit or for misrepresentation. It is not alleged that the prospectus was fraudulent, as in *Arnison* v. *Smith*. (1) The action is founded solely on s. 38, and the result of the decision in *Baty* v. *Keswick* (2) and *Cackett* v. *Keswick* (3) is that the plaintiff must prove that if these contracts had been disclosed he would not have taken the shares. That is in accordance with *Twycross* v. *Grant* (4) and *Sullivan* v. *Mitcalfe* (5); Buckley on the Companies Acts, 8th ed. p. 656.

The action depends upon the construction of the words "knowingly issue" in s. 38. The defendant did not know of these contracts, and that fact is fatal to the plaintiff's case. Constructive notice of them is not enough: *Twycross* v. *Grant* (6); *Greenwood* v. *Leather Shod Wheel Co.* (7) Mere knowledge that there are contracts in existence is not enough; it must be shewn that the defendant also knew their contents. The defendant as a director had the means of knowledge, but he cannot be treated as knowing more than he actually knew, even if it was his duty to inform himself: *Low* v. *Bouverie*. (8) A man cannot intentionally omit that of which he has no knowledge.

We do not contend that the contracts are not material, but we say that they all relate to the formation of the company, and that the waiver clause is a good defence to

(1) (1889) 41 Ch. D. 348.
(2) 85 L. T. 18.
(3) Ante, p. 456; 71 L. J. (Ch.) 641.
(4) 2 C. P. D. 469, 525.
(5) 5 C. P. D. 455, 460.
(6) 2 C. P. D. 542.
(7) [1900] 1 Ch. 421, 425.
(8) [1891] 3 Ch. 82, 103.

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the action. There is no objection in point of law to such a clause: Buckley on the Companies Acts, 8th ed. p. 656. The circumstances are very different from those in *Greenwood* v. *Leather Shod Wheel Co.* (1), which was not a case purely under s. 38. There is no question here of the fiduciary position of directors.

Norton, K.C., in reply. The section does not say that the plaintiff must prove that he would not have taken the shares had he known of these contracts. The question is whether he relied upon the prospectus as a whole. The language of the section does not mean that directors must know the contents of the contracts; the word "knowingly" only refers to the issue of the prospectus, not to knowledge of the contracts. The defendant admits that he knew there were contracts in existence, and that is sufficient to support the action; and according to his own evidence he had actual, not constructive notice of them.

Cur. adv. vult.

Aug. 5. BYRNE J. stated the facts, and continued:—Most of the legal considerations involved in the present case have so recently been stated by Farwell J. in the case of *Cackett* v. *Keswick* (2), that it is unnecessary now to repeat them. It has been clearly proved before me that the plaintiff applied for his shares upon the faith of the prospectus without notice of the contracts, and also that the defendant was a director "knowingly issuing" the same within the meaning of the section. It is not disputed that one or more of the contracts, in respect of which the statutory requirements have not been complied with, were material to be known by an intending applicant for shares, and the substantial defences are, first, that the defendant did not in fact know of the existence of these particular contracts; and, secondly, that the plaintiff has waived any right he might otherwise have possessed by the terms of his application for shares and of the prospectus, the application being for an allotment upon the terms of the prospectus.

(1) [1900] 1 Ch. 421.
(2) 50 W. R. 10; affirmed on appeal since the present case was heard, 71 L. J. (Ch.) 641; ante, p. 456.

[His Lordship read the material clauses of the prospectus, and continued :—]

The defendant took part in the preparation of the prospectus. Prior to 1889 he had been proprietor of Bucknall's Brewery, but in April of that year he had disposed of it. He read the whole of the prospectus. He did not ask to see the contract for purchase, Claremont to Broadbridge, of December 1, 1896; he says he may have seen it, but did not read its contents. He never asked what the contracts were which were referred to in the waiver clause. Upon his own evidence he left all the matters referred to on the last page of the prospectus to the legal men, and he was willing to leave those statements to others; and again he says, "Any statements as to legal matters I was content to take from my co-directors. As to such matters as I did not understand and did not ask about, I was content to rely on my co-directors and the solicitors."

I have not to deal with a case where a director has made inquiry about the contracts, or where he never had notice of the existence of contracts, or where, having attempted to discover the truth, he has himself been deceived, nor is it a case where he has been advised by his legal advisers that particular contracts are not such as need be referred to in the prospectus. He has been content simply to take the statements in the prospectus as they stand without further inquiry, and he has wilfully—that is, with knowledge that he is doing so—abstained from inquiry. It appears to me that this state of circumstances does not afford an answer to the fraud to be imputed in consequence of statutory enactment by reason of the omission to mention material contracts. The 38th section imposes an obligation the breach of which renders the director of a company as liable as he would have been independently of the section in an action of deceit, had it been proved that he had acted fraudulently—that is, if he had wilfully made a misrepresentation, or had made a representation recklessly and without caring whether the statement was true or false. To hold otherwise would be to hold that the 38th section has no application in cases where a director could prove that he was too careless to verify what he was putting forward in the prospectus, or

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even where he joined in putting forward a prospectus simply because his co-directors asked him to do so. He is responsible for what is stated in the prospectus, and in cases under the 38th section he is responsible as for a fraudulent document. I am disposed to think that, having regard to the terms of the section, the plea of ignorance on the part of a director can only be maintained where the facts would enable him to establish a right to say that the prospectus was not a document for which he was responsible, or, in other words, that he had in fact been defrauded or deceived into giving his sanction to a document which was not his.

The other point is as to the effect of the waiver clause in the prospectus; and it is now clearly established that a man may waive or release his statutory right to have the date and names of parties to material contracts set out in a prospectus. Every device to avoid giving to intending shareholders that information which the law says they should have is from time to time resorted to. My view is that it is a true statement of the law to say that no protection can be afforded to those responsible for the issue of a prospectus, under a waiver clause which they invite subscribers to submit themselves to, unless they fairly disclose what is the nature of the rights which they ask should be released or waived. Large print, little print, italics, red ink, and other attractive devices in other parts of the prospectus to lead the unwary away from the true path of inquiry are only specimens of the art of deceiving, and an apparent candour may be a most potent engine of deception.

In the present case there are at least six documents proved besides that mentioned in the prospectus (I leave out those not satisfactorily proved) to disclose which would have had a most material bearing upon a decision whether or not to apply for shares, and I do not think that the present prospectus sufficiently discloses the fact, which appears from the documents not specifically mentioned in the prospectus, of the enormous loading in the way of promotion profits which was in existence at the date of its issue. I say that the prospectus does not fairly disclose what it is that the intending investor is asked

to waive; and I notice particularly the words "are or may be" in respect of contracts about which there is not a shadow of doubt. I find also the collocation of ordinary trade contracts with promoting contracts. These are elements in arriving at the conclusion I have come to, which is that there is not an honest and fair statement of the nature of the contracts which persons applying are invited to waive. There must be judgment for the plaintiff for 200*l.* and interest at 4 per cent. from the date at which the last dividend was paid, and costs.

Solicitors: *Joseph Davis; Ashurst, Morris, Crisp & Co.*

H. C. R.

DAVIES *v.* TOWN PROPERTIES INVESTMENT CORPORATION, LIMITED.

[1902 D. 50.]

Landlord and Tenant—Lease—Covenant for quiet Enjoyment—Assignment of Reversion—Subsequent Purchase of adjoining Property by Assignee—Breach of Covenant—Personal Covenant—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 11.

In 1897 a lease for fourteen years of offices on the ground-floor of a house was granted to the plaintiff. The lease contained a covenant by the lessor for himself, his executors, administrators, and assigns, for the quiet enjoyment of the offices by the plaintiff without any disturbance by the lessor or any person lawfully or equitably claiming from or under him. In 1898 the defendant company bought the reversion in the house subject to the lease. In 1900 the company purchased from a stranger a house next door to that in which the plaintiff had his offices, pulled it down, and erected on the site of it buildings of such a height as to cause the plaintiff's chimney to smoke:—

Held, that the defendants had not broken the covenant inasmuch as the acts complained of had not been done by them, claiming the right to do such acts as authorized by or claiming under the lessor, but in exercise of their rights under an independent title acquired subsequently to the date of the covenant. The obligations of the lessor must be considered as at the date of the lease.

On June 3, 1897, a lease was granted by Mr. R. G. W. Lee to the plaintiff of offices on the ground-floor of 119, Colmore Row, Birmingham, for a term of fourteen years from

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September 29, 1897, at a yearly rent of 100*l*. The lease contained a covenant for quiet enjoyment.

On September 28, 1898, the reversion of 119, Colmore Row, expectant upon the determination of the lease to the plaintiff, was assigned to the Town Properties Investment Corporation, Limited, by Lee.

In the year 1900 the company purchased from a Mr. Barber, who had no connection with Lee, a house next door to 119, Colmore Row, and proceeded to pull it down and erect new buildings on its site to a much greater height than the old buildings. This caused the chimneys in the plaintiff's offices to smoke so as to materially interfere with the quiet enjoyment of one of his rooms.

The plaintiff brought an action for a declaration that the acts of the company constituted a breach of the covenant for quiet enjoyment, and for an injunction.

The form of the covenant was as follows: "And the lessor doth hereby covenant with the lessee that the lessee paying the rent hereby reserved and observing the covenants and conditions herein contained and on the part of the lessee to be observed and performed shall and may peaceably and quietly possess and enjoy the said offices during the said term without any eviction or disturbance by the lessor or any person lawfully or equitably claiming from or under him." By another clause in the lease it was provided that the expression "the lessor" should include Lee's executors, administrators, and assigns, where the context allowed.

On a motion for an interim injunction, it was agreed that the company should carry up the plaintiff's chimneys to the height of the new buildings, and that he, if he failed in the action, would pay the expenses of thus carrying up the chimney, and of removing it and restoring the wall to its former condition.

Norton, K.C., and *E. Clayton*, for the plaintiff. This action is founded simply on the breach of the covenant for quiet enjoyment. The burden of the covenant affects the defendants, who have become our landlords as assignees of Lee: Conveyancing Act, 1881, s. 11. It is said that the defendants are not

liable because the covenant does not bind the next-door house, which was not in the hands of the lessor at the time of the lease. But the covenant imposes a personal liability on the lessor's assignees as owners of the reversion not to disturb our enjoyment of our offices. It has nothing to do with their ownership of the adjoining house; we could sue them even if they were trespassers there. They are forbidden to disturb us whether they own that house or not, and they are the only persons in the world who cannot as against us treat that house as they have done. Their acts are not the less a breach of covenant because they have bought that house. They claim from or under Lee, and are liable for the disturbance: *Sanderson* v. *Berwick-upon-Tweed Corporation.* (1)

[*Levett, K.C.* After the decision of Buckley J. in *Tebb* v. *Cave* (2), we cannot dispute that causing chimneys to smoke is a breach of the covenant.]

It may be that a purchaser for value is not liable for acts done by the persons from whom he bought, and that he is only liable for what he himself has done; but these acts have been done by the defendants, and they are personally liable under the covenant: *David* v. *Sabin.* (3) Sabin was held liable because the breach was caused by something which he had himself done; he had himself created the lease in which the covenant was implied. The decision had nothing to do with the question whether the covenant ran with the land; but it established this—that a covenantor is personally liable on his covenant, although it is a liability personal to himself which cannot be enforced against anybody else. We should have no remedy against the owner of the adjoining house if he were not our landlord: *Bryant* v. *Lefever.* (4)

Levett, K.C., and *Austen-Cartmell*, for the defendants. A covenant for quiet enjoyment such as this cannot grow larger in its operation as the covenantor acquires more land. It is fixed once and for all at the date of the lease, and that is the covenant which runs with the land: *Booth* v. *Alcock* (5); s. 11

(1) (1884) 13 Q. B. D. 547.
(2) [1900] 1 Ch. 642.
(3) [1893] 1 Ch. 523.
(4) (1879) 4 C. P. D. 172.
(5) (1873) L. R. 8 Ch. 663.

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of the Conveyancing Act, 1881. We are only bound by the covenant so far as Lee owned the land: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson.* (1) A covenant for quiet enjoyment does not enlarge rights granted by the conveyance: *Leech* v. *Schweder.* (2) At the time when this lease was granted Lee could give no rights over the adjoining house. This is not a breach of covenant, for the result of the rebuilding could not have been foreseen: *Harrison, Ainslie & Co.* v. *Lord Muncaster* (3) That case also shews (4) that, to be a breach, the interruption must be by the acts of the lessor, or of those claiming under him the right to do the acts. In this case we hold the adjoining house by an independent title, and do not claim from or under Lee the right to rebuild it.

A personal covenant does not run with the land under s. 11 of the Conveyancing Act, and we are not bound by it. We can only be bound in so far as we are owners of the reversion of 119, Colmore Row. If we sold the reversion we should be no longer liable on the covenant. Even if Lee had bought the adjoining house, he could have done what we have done in spite of the covenant. *David* v. *Sabin* (5) turned upon a question of construction, and Sabin had himself done the very thing for which the covenant provided. That decision is really in our favour. A. L. Smith L.J. says (6) that if a man sells land and buys it back again fifty years afterwards he is not liable for what has happened in the interval. Therefore he is not estopped from enjoying the ordinary rights of an owner of property: White and Tudor's L. C. in Eq. 7th ed. vol. i. p. 459.

Norton, K.C., in reply. *Booth* v. *Alcock* (7) turned entirely upon the extent of the easement that was granted. *Leech* v. *Schweder* (2) only decided that what was not interruption at law was not a breach of the covenant.

We cannot sue Lee because he is no longer our landlord and has never been owner of the adjoining house. The personal liability only continued as long as he was owner of the rever-

(1) [1898] 2 Ch. 394, 402.
(2) (1874) L. R. 9 Ch. 463, 474.
(3) [1891] 2 Q. B. 680.
(4) [1891] 2 Q. B. 685.
(5) [1893] 1 Ch. 523.
(6) Ibid. 544.
(7) L. R. 8 Ch. 663.

sion. *Harrison, Ainslie & Co.* v. *Lord Muncaster* (1) supports our case, for this was the direct act of our landlord.

Cur. adv. vult.

Aug. 12. BYRNE J. stated the facts, and continued:—The rebuilding with the ensuing result would not afford a right of action against a stranger: see *Bryant* v. *Lefever*. (2) On the other hand, it is such a substantial interference with the enjoyment of the property demised as to constitute a breach of a covenant for quiet enjoyment, if caused by the lessor or any person lawfully or equitably claiming from or under him within the meaning of the covenant in the lease. The form of the covenant in the present case is as follows: [His Lordship read the covenant.] Sect. 11 of the Conveyancing Act, 1881, provides: "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

The question here is whether or not the defendants are liable as for breach of the covenant, they being assignees of the reversion in the demised premises, but not having done the act complained of under colour of any title as such assignees, but in exercise of an independent right of property acquired aliunde, and after the date of the original lease. No question as to derogation from grant or estoppel arises.

The true meaning and effect of covenants for quiet enjoyment as between lessor and lessee was fully considered in *Harrison*,

(1) [1891] 2 Q. B. 680, 689, 691. (2) 4 C. P. D. 172.

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Ainslie & Co. v. *Lord Muncaster*. (1) Lord Esher M.R. says: "In this case the first question is, Was the enjoyment of the plaintiff's mine interrupted, in the sense in which that word is interpreted in the covenant? I have no doubt that it was. Formerly it was thought that a covenant for quiet enjoyment only applied to an interference with the title of the covenantee, but upon more careful consideration it was held that it applied to an interference with the enjoyment of the thing demised; and it seems clear that there may be an interference with the enjoyment of property without any interruption to or interference with the title to it. The case of *Sanderson* v. *Berwick-on-Tweed Corporation* (2) is a clear authority that the interruption contemplated by the covenant need not necessarily be an interference with the title, but may extend to an interference with the enjoyment; and that decision, interpreted in that way, was, in my opinion, authorized by the case of *Shaw* v. *Stenton* (3); but it goes no further. In the first-named case Fry L.J., who gave the judgment of the Court, has stated an abstract proposition, and has used words which, if regarded merely as the statement of an abstract proposition, would carry the liability of the person giving such a covenant to a great length; but looking at the words used, and bearing in mind what was the subject-matter of that particular case, it will be seen that our decision in the present case is entirely consistent with, and within the meaning of, the language used in that judgment. 'It appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted.' That is the first proposition, and in this case I should determine that question of fact in favour of the plaintiffs; for to swamp a man's mines so that he cannot work them, is certainly to interrupt the enjoyment of them. The judgment goes on, 'and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor'—that is by the acts of the person who has entered into the covenant—'or those lawfully claiming under him.' I pause there for a minute. Not only must the

(1) [1891] 2 Q. B. 680, 684, 685. (2) 13 Q. B. D. 547.
(3) (1858) 2 H. & N. 858.

enjoyment be interrupted, but it must be interrupted by the acts of the lessor, or those lawfully claiming under him: the last words require some definition and limitation. Considering what was being discussed, I have no doubt that the proper meaning of those words is, 'by the acts of the lessor, or of those claiming under him the right to do the acts which caused the interruption.'"

It appears to me that the acts done by the defendants here were not done by them claiming the right to do such acts as authorized by or claiming under the plaintiff's lessor, but in exercise of their rights under an independent title acquired subsequently to the date of the covenant.

I think that the covenant must be construed having regard to the circumstances which existed at the date of the lease, and that the assignees of the reversion cannot be held liable for acts lawfully done under an independent title created subsequently to the lease.

David v. *Sabin* (1), relied upon by the plaintiff, is not an authority for the proposition that assignees of a reversion in one property are by reason of the existence of a covenant for quiet enjoyment thereby precluded from making lawful use of another property acquired by them in good faith.

There is much force in Mr. Levett's observation that to hold the plaintiff entitled to relief would be to hold that the rights and liabilities under the covenant are not defined as at the date of the covenant, but that they are liable to grow as the covenantor acquires new properties.

I think that the case of *Booth* v. *Alcock* (2) supports the view that the obligations of the lessor are to be considered as at the date of the lease.

On a consideration of the whole case, I am of opinion that the plaintiff fails, and that he must fulfil the undertaking given on the motion and pay the costs of the action.

Solicitors: *C. P. Eaton Taylor; F. A. K. Doyle, for S. T. Talbot, Birmingham.*

(1) [1893] 1 Ch. 523.

(2) L. R. 8 Ch. 663.

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R. 541.

FARWELL J.

1902

July 2, 3, 12.

In re DELANY.
CONOLEY *v.* QUICK.

[1902 D. 12.]

Will—Impure Personalty—Gift to named Persons "or their Successors"—Officers of Voluntary Associations—Charitable Uses—Charitable Uses Act, 1735 (9 *Geo.* 2, *c.* 36), *s.* 3.

A testator, who died in 1886, gave the rents of his freehold and leasehold estates to his wife for life, and after her death he directed his trustees to sell the property and to divide the proceeds in (amongst others) the following legacies: "To M. O., H. M., A. C., Nazareth House, Hammersmith, or their successors, 400*l*. To E. M. and M. L., of the Convent of the Assumption, Bromley-by-Bow, or their successors, 300*l*."

At the date of the will and of the death of the testator M. O., H. M., and A. C. were members and officials of a religious community known as the Poor Sisters of Nazareth; and E. M. and M. L. were members and officials of a religious community known as the Little Sisters of the Assumption. Both of these communities were societies of Roman Catholic ladies living together in a state of celibacy for the purpose of sanctifying their souls by prayer and pious contemplation: and also as to the Poor Sisters of Nazareth, with the object of affording permanent homes for aged and infirm persons of both sexes; and as to the Little Sisters of the Assumption, with the object of gratuitously nursing the sick of the poorest classes in their own homes:—

Held, that the bequests were not gifts to the named individuals for their own personal benefit, but to them as holders of offices and for the benefit of the associations in which they respectively held office; and that, as the objects of the associations were charitable, the gifts were void under the Mortmain Act, 1736.

Cocks v. *Manners*, (1871) L. R. 12 Eq. 574, followed.

THIS was an originating summons to determine the validity of certain pecuniary bequests.

J. Delany made his will dated January 1, 1884, and thereby, after certain legacies to his wife, gave the rents of his freehold and leasehold estates to her during her life, and after her death he directed his trustees to sell the property, "and the proceeds to be divided in legacies as follows: To Mary Owen, Honora McAuliffe, Annie Clarke, Nazareth House, Hammersmith, or their successors, the sum of 400*l*. To Eliza McHenry, Margaret Libaud, of the Convent of the Assumption,

Wellington Road, Bromley-by-Bow, or their successors, the sum of 300*l.* To the Rev. Frederick Bampfield, superior of the Institute for Boys and Girls, Barnet, Herts, or his successor, the sum of 100*l.* To the Rev. Lord Archibald Douglas, superior of the St. Vincent's Home for Boys, Harrow Road, London, W., or his successor, the sum of 100*l.* To the Rev. Francis Verhagen, of the Franciscan Friary, Stratford, Essex, or his successor, the sum of 300*l.* To Lizzie Mulhearn, Burleigh Road, Upton, in her own right, the said sum of 100*l.* To Kate Dore, of 2, Bexley Villas, Carnarvon Road, Stratford, Essex, in her own right, 100*l.* To Robert Dore, 2, Bexley Villas, Carnarvon Road, Stratford, Essex, the sum of 100*l.* To the Rev. Cornelius Keens, Corpus Christi Church, Midon Lane, or his successor, the sum of 19*l.* 19*s.*"; and the testator directed that if any of the aforesaid legatees should die before coming into their said legacy, the same should be divided between the surviving legatees; and the testator gave all the residue of his estate to the said respective legatees in proportion to the amount of their respective legacies. The testator made a codicil, dated September 7, 1885, to his will, and thereby gave the plaintiff a pecuniary legacy. He died on July 6, 1886, without issue, leaving his wife surviving him. She died in January, 1901, and the defendant Ada Boffee was her legal personal representative.

The testator's property consisted of six leaseholds and one freehold. If, therefore, the objects of any of the gifts in his will were charitable, such gifts were void under the Mortmain Act, 1736. Under these circumstances the summons was taken out.

The next of kin and heir-at-law of the testator were not known, but the Court held that the defendant Ada Boffee, whose interests were the same as theirs, sufficiently represented their interests for the purposes of the arguments.

The Rev. F. Bampfield died in 1900, and the defendant Father Spink was the present superior of the Institute.

The other material facts sufficiently appear in the judgment.

P. B. Abraham, for the plaintiff.

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C. E. Shebbeare, for the Poor Sisters of Nazareth and the Little Sisters of the Assumption. These are gifts to the persons named for their own benefit. No office is mentioned; and the words "*or* their successors" are inserted, not to indicate the persons who may hold office at the time the gift takes effect, but to prevent lapse: *Wingfield* v. *Wingfield* (1); *Gittings* v. *M'Dermott*. (2) Except for the word "successors," even if any office were named, the gift would be beneficial: *Doe* v. *Aldridge*. (3) But the words are really not material for the present purpose, because all these named persons survived the tenant for life and are still living. Therefore they take beneficially: *In re Delany's Estate*. (4) Next, this is not a gift "to or in trust for any charitable use" within the meaning of the Charitable Uses Act, 1735, s. 3, and 43 Eliz. c. 4. No trust at all is specified, and none will be presumed: *Cook* v. *Fountain* (5); *Faversham Corporation* v. *Ryder*. (6) The question here is, not as to how these legatees hold *their* property, but as to how the testator has specified they shall hold *this* property. The gift is as unfettered by any trust as the gift in *In re Harbison* (7); *Wallgrave* v. *Tebbs*. (8) But if there is any trust, it is not confined to charitable uses: *Doe* v. *Copestake* (9); *Stewart* v. *Green* (10); *Morrow* v. *M'Conville*. (11) The case of *Cocks* v. *Manners* (12) will be cited against us; but there there was a direct gift to religious institutions. Lastly, this gift is unaffected by the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), because by s. 37 of that Act women's societies are exempted.

D. L. Koe, for the defendant Verhagen, argued to the same effect.

A. H. Withers, for the defendant Spink. This is a good gift to the person who is the superior of the Institute at the death of the tenant for life: *Robb* v. *Dorrian*. (13)

(1) (1878) 9 Ch. D. 658.
(2) (1834) 2 My. & K. 69; 39 R. R. 139.
(3) (1791) 4 T. R. 264; 2 R. R. 379.
(4) (1882) 9 L. R. Ir. 226.
(5) (1736) 3 Swans. 585.
(6) (1854) 5 D. M. & G. 350.
(7) [1902] 1 I. R. 103.
(8) (1855) 2 K. & J. 313.
(9) (1805) 6 East, 328.
(10) (1871) I. R. 5 Eq. 470.
(11) (1883) 11 L. R. Ir. 236.
(12) L. R. 12 Eq. 574.
(13) (1877) I. R. 11 C. L. 292.

A. L. Ingpen, for Ada Boffee. There is an intestacy. The gifts are to named persons in respect of the offices they hold. The word "successors" must refer to office, and, if the office held is charitable, the gift is void: *Thornber* v. *Wilson* (1); *Robb* v. *Dorrian* (2); *Cocks* v. *Manners*. (3)

H. C. Bischoff, for another defendant in the same interest.

Cur. adv. vult.

July 12. FARWELL J., after stating the facts, continued:—The questions to be decided are—(1.) Are the gifts to the several individuals named, "or their successors," or "his successor," legacies given to the individuals for their own benefit, or are they given to the holders of offices for the benefit of the associations in which they hold office? And, if the latter, (2.) Are the objects of such associations charitable? It is necessary to consider each gift separately. The first is "to Mary Owen, Honora McAuliffe, Annie Clarke, Nazareth House, Hammersmith, or their successors." Mary Owen, Honora McAuliffe, and Annie Clarke were at the date of the will and of the death of the testator members and holders of official positions in a religious community known as the "Poor Sisters of Nazareth," but since 1891 Miss McAuliffe has held no office. This community is a society of Roman Catholic ladies voluntarily living together in a state of celibacy for the purpose of sanctifying their own souls by prayer and pious contemplation, and also with the object of affording permanent homes for aged and infirm poor persons of both sexes without distinction of creed or nationality, and homes for incurable and orphan children. The community own several houses which are vested in trustees, but the three ladies named do not by themselves hold any of such houses as such trustees, but only in conjunction with others. Members of the community are bound in conscience to hand over any money coming to them for the use and benefit of the community. Money given to the community generally is applied partly in keeping up the houses

(1) (1855) 3 Drew. 245; (1858) 4 Drew. 350.

(2) I. R. 11 C. L. 292.

(3) L. R. 12 Eq. 574.

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of the community and partly for their charitable purposes. The testator was acquainted with Mary Owen and Honora McAuliffe, but not with Annie Clarke. Her name was supplied to him by some member of the community when he expressed a desire to benefit the community and asked in what names the legacy should be given. In my opinion, the legacy is given to the three ladies as holders of offices and for the benefit of the association in which they held office. The primary meaning of the word "successors" is persons in succession. The persons named were known to the testator to be holders of offices in the association, and the only succession to which he can refer is the succession to those offices. The persons named are not intended to take any personal benefit, but are designated only as the then holders of office, and the gift to them depended on their continuance in such office. The decision of Kindersley V.-C. in *Thornber* v. *Wilson* (1) is an authority in favour of this view, and his subsequent decision on another gift in the same will (2) is even stronger. In the latter case there was a devise (subject to a term of seven years) of real estate on trust to sell and pay the net residue of the proceeds of sale "to the minister of the Roman Catholic chapel at Kendal." The Vice-Chancellor, in giving judgment, says (3): "I cannot entertain any doubt that the intention was to benefit the minister as such, that is, the chapel. The question whether there is a charitable gift does not depend on the fact that there is a gift to an individual describing him as minister; but on this, whether the testator designates the individual as such, or as being the person who happens to fill the office. A gift to a minister as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to the person *now* minister would have been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office. And here the surplus is only to be realized at the end of seven years after the testator's death, which makes it

(1) 3 Drew. 245. (2) 4 Drew. 350.

(3) 4 Drew. 351.

stronger to shew that the testator meant to benefit the chapel, not the particular person." In the case before me the widow has a preceding life interest, and the Vice-Chancellor's concluding observations therefore apply to this case also. So, too, in *Smart* v. *Prujean* (1), Lord Eldon expressed his opinion that a legacy of 100*l.* for such purposes as the superior of the convent or her successor should judge most expedient, being given in that character, was sufficient to shew it was for a superstitious use.

The mere description of the legatee as the holder of an office is not, of course, sufficient to raise any such inference. Thus, in *Doe* v. *Aldridge* (2), a devise to the Rev. A. A., "late of Amesbury, but now preacher at the meeting-house in Lyndhurst," for life was held a gift to him for his own benefit; and in *Donnellan* v. *O'Neill* (3), where the devise was to Cardinal Cullen, and in case of his death to the Roman Catholic Archbishop for the time being of Dublin, and to his heirs, &c., "absolutely for his and their own use and benefit," the Vice-Chancellor treated the devise as a clear gift for the personal benefit of the devisees.

I am further of opinion that the objects of the association are charitable, and that the gifts, therefore, fail. The case is indistinguishable from that of the Sisters of the Charity of St. Paul at Selley Oak in *Cocks* v. *Manners*. (4) The care of the aged and infirm poor and of incurable and orphan children is the outward and visible object of the association of the Poor Sisters of Nazareth, and this admirable object is not rendered less charitable within the meaning of the Act of Elizabeth because the sisters also desire to sanctify their own souls by prayer and contemplation, whether such sanctification is regarded as concurrent with or assisted by their charitable work. The Court can only look to the actual purpose aimed at by the association, and cannot inquire into the motives of the members of the association. The care of the aged poor and the like is a charity within the Act whether the persons who

(1) (1801) 6 Ves. 560, 567; 5 R. R. 395.
(2) 4 T. R. 264; 2 R. R. 379.
(3) (1870) I. R. 5 Eq. 523.
(4) L. R. 12 Eq. 574.

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devote their lives to it are actuated by the love of God, a desire for their own salvation, or mere pique, or disgust with the world. The legacy and share of residue, therefore, given for the Poor Sisters of Nazareth fail.

The next gift is to Eliza McHenry and Margaret Libaud, of the Convent of the Assumption, or their successors. These two ladies both held office in the community of the Little Sisters of the Assumption at the date of the will and of the death, but have held no office therein since 1891. This community is a society of Roman Catholic ladies voluntarily living together in a state of celibacy for the purpose of sanctifying their own souls by prayer and contemplation, and for the purpose of gratuitously nursing the sick of the poorest classes in their own homes. It is supported by voluntary contributions, which are expended in lodging, boarding, and maintaining the members thereof. I am unable to distinguish this gift also from that to the Sisters of St. Paul at Selley Oak in *Cocks* v. *Manners*. (1) Indeed, I may read Wickens V.-C.'s judgment with some immaterial omissions as applicable to the present case (2): "The community is, in point of law, a voluntary association for the purpose of nursing the sick; and I cannot distinguish it in this respect from any of the numerous voluntary associations established in London, such as the Scripture Readers, Home Missionaries, or Anglican Sisters of Mercy, in which zealous persons unite for the purpose of performing charitable functions, taking out of the funds of the association so much as is necessary for their own wants, and extending their operations as their means permit." And he distinguishes the gift in that case to the Selley Oak community from another gift in the same will to a Dominican convent, on the ground that the sole purpose of the latter was to sanctify their own souls by prayer and contemplation without engaging in any corporal works of mercy. The Vice-Chancellor pointed out that religious services can only be charitable so far as they tend towards the edification or instruction of the public, and he held that the gift referred to above was not charitable. There is, in truth, no "charity" in attempting to improve

(1) L. R. 12 Eq. 574. (2) L. R. 12 Eq. 584.

one's own mind or save one's own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others; but, given the latter, the motive impelling it is immaterial.

The next gift is to the Rev. Frederick Bampfield, superior of the Institute for Boys and Girls, Barnet, or his successor. He was such superior at the date of the will and of the death of the testator, but died in January, 1900. The defendant Francis Spink is the present superior. This gift also is, in my opinion, to the holder of the office, not to the individual. The Institute is a congregation of Roman Catholic secular priests, students, and lay brothers living together under rule for their own spiritual benefit, and for carrying on various works for the benefit of their neighbours, one of which, and that obviously referred to by the testator, is an educational charity for poor boys and girls. This legacy, therefore, fails. The next legatee, the Rev. Lord Archibald Douglas, is not a party, and the next is the Rev. Francis Verhagen, who was at the date of the will superior of the Franciscan Friary at Stratford, but ceased to be so in the testator's lifetime. He can, in my opinion, take nothing beneficially, and I have not the present superior before the Court. There must be the usual inquiry for the heir-at-law and next of kin of the testator, and the costs of all parties down to to-day will come out of the estate.

Solicitors for all parties: *Hussey & Ingpen.*

H. L. F.

FARWELL J.

1902

Aug. 6.

In re BOWLES.
AMEDROZ *v.* BOWLES.

[1902 B. 1277.]

Perpetuity—Remoteness—"Possibility on a Possibility"—Gift to an unknown Person for Life, and after his Death to his Children—Personal Estate.

The old rule against "a possibility on a possibility," namely, that although an estate may be limited to an unborn person for life, yet a remainder cannot be limited to the children of that unborn person as purchasers, has no application to personal estate.

By a marriage settlement personal estate was settled in trust, after life interests given to the husband and wife, for the children of the marriage, or any issue born in the lifetime of the survivor of the husband or wife, in such shares and manner as they should jointly appoint. They appointed in equal shares to the three children of the marriage for life, and after their respective deaths to such of their children born in the lifetime of the husband and wife as should attain twenty-one:—

Held, a good appointment, and not void for remoteness.

By a settlement dated October 6, 1818, made upon the marriage of the Rev. George Downing Bowles and Anne his wife, then Anne Stillingfleet, spinster, certain stocks and funds were transferred to trustees upon trust after the death of the survivor of the husband and wife for the child or children of the said marriage, "or such one or more exclusively of the other or others of them, or any issue born in the lifetime of the said G. D. Bowles and Anne Stillingfleet or the survivor of them, of any such child or children, with such provision for their respective maintenance, education, and advancement, and at such age or time or respective ages or times not being after twenty-one years, to be computed from the decease of the survivor of the said G. D. Bowles and Anne Stillingfleet, and if more than one, in such shares and proportions and with such limitations over for the benefit of some or one of the said children or issue, as to part of the said funds, as the said Anne Stillingfleet alone during her life, and as to other part of the said funds, as the said G. D. Bowles and Anne Stillingfleet jointly during their joint lives should by deed appoint."

By a deed dated February 28, 1849, and made between the said G. D. Bowles and Anne his wife of the first part, the said Anne Bowles of the second part, and Charles James Stillingfleet Bowles, George Downing Bowles, and Caroline Anne Bowles, the three children of the said marriage, of the third part, all the said trust funds were duly appointed, subject to the life interests of the said G. D. Bowles and Anne Bowles therein, in equal third shares, in trust for each of the three children of the marriage for their respective lives, and after the death of each of them in trust for his or her children, born in the lifetime of the said G. D. Bowles and Anne Bowles, who should live to attain the age of twenty-one years.

This summons was taken out for the determination of certain questions arising on the construction of certain accruer clauses in the deed of appointment not requiring a report; but at the hearing it was suggested that the settlement and appointment together effected a gift to unborn children for life, with executory limitations over to their unborn children, and might be held void for remoteness.

The summons was therefore amended to raise this question.

H. E. Wright, for the trustees.

Upjohn, K.C., and *Underhill*, for persons entitled in default of appointment. It has been decided by the Court of Appeal in *Whitby* v. *Mitchell* (1) that the old rule against "a possibility on a possibility" which forbids the limitation of an estate to an unborn person for life, with remainder to his child, still exists, and has not been merged in or superseded by the modern rule against perpetuities. The question whether that rule applied to executory limitations of personal estate has never been decided. The history of the rule is discussed in Butler's note in Fearne on Contingent Remainders, 10th ed. vol. i. p. 565, where he says that there was never any objection at common law to remainders on the ground of perpetuity. The rule against a possibility on a possibility he regards as an exception; it would perhaps be better to say that the judges saw that some limit was necessary to the indefinite creation

(1) (1890) 44 Ch. D. 85.

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of remainders and adopted this rule. The note goes on to say that our law never allowed remainders in personalty, but when successive limitations of personal estate were introduced applied to them the rules which had been devised for executory devises of real estate. There are some dicta of the judges which have a bearing on the point. In *Jee* v. *Audley* (1) and *Long* v. *Blackall* (2) Lord Kenyon appears to treat personal settlements as subject only to the rule against perpetuities. In *Routledge* v. *Dorril* (3) the original settlement was of personal estate, and the trusts were practically the same as those of the settlement in this case. An appointment was made by the wife, Elizabeth Dorril, on the marriage of her daughter, Elizabeth Edwards, for life, then in trust for her daughter's husband for life, and then in trust for all the children of the daughter's marriage as she should appoint. The Master of the Rolls decided that the appointment was bad, on the ground that the appointment was in favour of all the daughter's children, and not confined to those born in their grandmother's lifetime. If so confined, he says it would have been good.

It was not necessary to decide whether the rule as to a possibility on a possibility applied, but it is plain the Master of the Rolls did not think it did. That case is cited by Butler in his note to Fearne on Contingent Remainders, 10th ed. vol. i. p. 251, as a proof that the rule against a possibility on a possibility does not extend to every case of possibility. It would seem, therefore, that he thought it did extend to personalty. But we have not found any decision or dictum applying the rule to executory limitations, and the fair result of the cases would seem to be that the rule against perpetuities was invented because the older rule did not apply to them, and the judges saw that some rule was necessary.

[They also referred to *Cole* v. *Sewell*. (4)]

Jenkins, *K.C.*, and *Gatey*, for persons claiming under the appointment, were not called upon.

(1) (1787) 1 Cox, 324; 1 R. R. 46.
(2) (1797) 7 T. R. 100, 102; 4 R. R. 73.
(3) (1794) 2 Ves. Jr. 357; 2 R. R. 250.
(4) (1843) 4 D. & War. 1, 28.

FARWELL J. I think it is reasonably plain that whatever the doctrine of "a possibility on a possibility" may have originally meant, at present it exists only to the extent stated in the head-note to *Whitby* v. *Mitchell* (1): "The old rule against 'a possibility on a possibility' applicable to legal limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities." It is obvious that that cannot apply to personal estate, because there is no such thing as a legal remainder in personal estate; nor do I see any reason why the rule should now, for the first time, be applied to personal estate when it is protected from any limitations unduly restricting alienation by the ordinary rule against perpetuities. The rule existed before any rule of perpetuities was recognised, and remained afterwards, either because the rule against perpetuities does not apply to remainders, or because no competent authority has thought fit to abrogate it. So far as this case is concerned, although there is no express decision on the point, the opinion of the Master of the Rolls, Sir Richard Pepper Arden, in *Routledge* v. *Dorril* (2), is very clearly stated, that so long as you make it clear that the limits of perpetuity are not transgressed, you may appoint personal estate to an unborn child for life, with remainder to unborn children. He says (3): "There is no doubt, that under the words of the original power any issue of the intended marriage living at the death of the husband or wife would have been competent to receive a share; and there being three children of Elizabeth Edwards, living at the death of Elizabeth Dorril, if she had appointed to them, without doubt they might have taken. But she has appointed to Mrs. Edwards for life; and instead of giving it to such of her children, as should be living at the death of their grandmother, she has given to all the children her daughter might have during her life. Those that may be born after the death of their grandmother cannot be included among

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(1) 44 Ch. D. 85. (2) 2 Ves. Jr. 357; 2 R. R. 250.
(3) 2 Ves. Jr. 362.

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those in whose favour the power may be executed; and the question is, whether those children, who might have been the proper objects, shall take. At first I was of opinion, that as she might have appointed to the three children born before her death, when she appointed to all, these three might be considered as the sole objects: but upon considering it farther, and particularly upon *Jee* v. *Audley* (1), I am of opinion, that would be a forced construction; and that the grandmother in affecting to give this to all the issue her daughter might have at any time, has transgressed the power; and so far being ill executed it is to be considered as not executed, and is totally void." It is quite plain from that passage that Sir R. P. Arden considered that if the appointment had been limited to Mrs. Edwards, that is to say an unborn child, for life, with remainder to such of her children as should be living at the death of the appointor, that would be good. That is again expressed in the passage at the end of the judgment to which reference has been made (2): "This testatrix had power to appoint among grandchildren or the issue of grandchildren; but provided they were living at her death; for otherwise it would be tying it up beyond the limits. She has given estates for life to her different children; and after their deaths the principal, not to those born during her life, of which there were none but the children of Mrs. Edwards, but to all." Therefore, although that is not a decision, it is an expression of the opinion of Sir Richard Pepper Arden more than one hundred years ago, and I think it is a perfectly correct statement of the law on the subject. There will be a declaration that these trusts are not void for remoteness.

Solicitors: *Fladgate & Co.; Ellis, Munday & Clarke, for Lambert & Rogers, Great Malvern; Lovell, Son & Pitfield.*

(1) 1 Cox, 324; 1 R. R. 46. (2) 2 Ves. Jr. 366.

J. R. B.

BRADFORD CORPORATION *v.* FERRAND.

FARWELL J.

1902

Aug. 5, 6, 12.

[1901 B. 3036.]

Water—Underground Stream—Channel defined but not known.

If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water.

The Sweet Well Spring was one of the principal feeders of the Morton Beck, on the banks of which the plaintiffs were riparian proprietors. The water flowed from the spring to the beck in a visible channel above ground. The spring was alleged to be fed by underground water flowing in a defined channel, but the course and existence of this channel were not known, and could not be ascertained except by excavation. The defendants by sinking wells above the Sweet Well Spring diverted the underground supply and diminished the flow of water from the spring:—

Held, that the plaintiffs had no cause of action.

THIS action was brought by the corporation of Bradford and the owners of certain mills upon the banks of a natural stream called Morton Beck, in the county of York, formed by the junction of two natural streams called the Bradup Beck and the Fenny Shaw Beck, and a canal company against William Ferrand and the Shipley Urban District Council for an injunction to restrain the defendants from diverting the water flowing in a defined channel to and feeding a spring, situate on the defendant Ferrand's property, so as to diminish the quantity of water flowing thence to the Morton Beck. The plaintiffs other than the canal company claimed a right to the uninterrupted flow of this water as riparian proprietors; the canal company claimed under their Act of Parliament a right to take all the water of the beck except a certain fixed quantity, which was by arrangement with the lower riparian proprietors allowed to pass under their canal.

The statement of claim contained the following allegations:—

The defendant William Ferrand is the owner and occupier of an allotment of moorland, part of the moor called the Morton Moor, and upon this allotment a spring known as

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the Sweet Well Spring rises and flows by means of a natural stream known as the Sweet Well Dyke into the Sunnydale Reservoir on the said Bradup Beck. The said Sweet Well Spring has from time immemorial been, and up to the beginning of this present year 1901 was, one of the main feeders of the said Morton Beck, and has been in dry seasons the principal feeder. Before issuing to the surface the water that issues at the said spring flows in a well-defined and ascertained channel under the surface of the ground.

In the year 1900, or early in the present year 1901, the defendants, the Shipley Urban District Council, entered into an arrangement with the defendant William Ferrand whereby he granted permission to the defendant council to sink certain shafts or wells on his land, in close proximity to the spot where the waters of the Sweet Well Spring flowed to the surface. The defendant council, accordingly, early in the present year, sank certain shafts or wells for the purpose of intercepting or diverting, as they did in fact intercept and divert, the said waters in their well-defined underground channel, and they prevented the said water from flowing to the surface in their accustomed channel, and thence to the Bradup Beck and Morton Beck.

On April 25 the plaintiffs moved for leave to enter on the defendant's land and make the necessary excavations, experiments, and observations for the purpose of ascertaining whether the waters which issued at the Sweet Well Spring flowed before so issuing in a definite underground channel.

This motion was refused by Farwell J. The plaintiffs appealed; and on May 14, 1902, the Court of Appeal ordered the motion to stand over, upon the defendants undertaking to amend their statement of defence so as to raise as a point of law the question whether there is any right in underground water where the course of that water is unknown except by excavation.

The defendants amended their defence by adding the following paragraph: "Assuming that underground water flows or flowed to the said Sweet Well Spring in a defined channel, but that the existence and course of that defined channel is

not and cannot be ascertained or known except by excavation of the soil, the plaintiffs have no right of action for the abstraction of such underground water, and are not entitled to maintain this action." The point of law now came on for argument.

Butcher, K.C. (*A. P. Longstaffe* with him), for the defendants. There can be no right to the water flowing in an underground channel unless the channel is known. The exact point was decided by the Court of Appeal in Ireland in *Ewart* v. *Belfast Poor Law Guardians* (1), and that case was approved in *Black* v. *Ballymena Township Commissioners* (2), though there the Court held on the evidence that the defined channel was known. In the latter case Chatterton V.-C. defines the sort of knowledge which is required to give a right to the flow of a defined underground stream. He says: "The knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel; but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing, condition of the surface of the ground."

Of course those cases are not binding on this Court, but we submit that the law there stated is a fair deduction from the English decisions.

In *Chasemore* v. *Richards* (3), which settled the law that a man has no right of action for the diversion of percolating underground water, the main ground of the decision is stated by Wightman J. in giving the opinion of the judges, by Lord Chelmsford and Lord Wensleydale, to be the uncertainty of the right, and the burden thrown on the owner of land through which the water flows who may incur liability for heavy damages by infringing a right of the existence of which he was wholly ignorant. The judgment of Palles C.B. in *Ewart* v. *Belfast Poor Law Guardians* (1) shews that these reasons apply as well to water flowing in a defined, but unknown, channel as to percolating water. The law as laid down in *Chasemore* v. *Richards* (3) is that a man may dig in his own ground as he

(1) (1881) 9 L. R. Ir. 172. (2) (1886) 17 L. R. Ir. 459, 474.
(3) (1859) 7 H. L. C. 349.

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likes, unless he infringes the paramount right of another. In the case of a surface stream there is such a paramount right; in the case of an unknown underground stream there is none. All the text-books shew that the right to flow of water depends upon the channel in which it flows being known: 2 Broom's Commentaries, p. 38; Angell on Watercourses, 6th ed. pp. 4, 6; Kent's Commentaries, 12th ed. vol. 3, par. 439, p. 581; Gale on Easements, 7th ed. p. 214. In Kent, which is quoted with approval in *Embrey* v. *Owen* (1), the right is founded on the maxim "Aqua currit et debet currere qua currere solebat," which presupposes that it is known where it was wont to run. From the earliest cases onwards the right is always stated as a natural one "ex jure naturae": *Shury* v. *Piggot* (2); *Brown* v. *Best* (3); *Embrey* v. *Owen*. (4)

In *Acton* v. *Blundell* (5), which was the first case dealing with the question of underground water, Tindal C.J. bases the right to the flow of a stream above ground wholly on notoriety, and says the principle does not apply at all to underground water. *Dudden* v. *Guardians of Clutton Union* (6) was a case where the defendants had appropriated a spring after it had risen to the surface.

In *Dickinson* v. *Grand Junction Canal Co.* (7) Pollock C.B. seems to have first started the theory of right to underground water in a defined channel; but in that case, and in every other one in which defined underground channels have been referred to, the judges seem to have had in their minds the river Mole and similar rivers, which after flowing in a defined channel above ground run underground for a time and then reappear, in which cases their course is clearly known.

In *Dickinson* v. *Grand Junction Canal Co.* (7) the injunction was extended to percolating water; but this is clearly inconsistent with *Chasemore* v. *Richards*. (8)

The principles there laid down apply to unknown under-

(1) (1851) 6 Ex. 353, 370.
(2) (1625) 3 Bulst. 339.
(3) (1747) 1 Wils. 174.
(4) 6 Ex. 353.
(5) (1843) 12 M. & W. 324.
(6) (1857) 1 H. & N. 627.
(7) (1852) 7 Ex. 282.
(8) 7 H. L. C. 349.

ground streams as fully as to percolating water. The judgments in the House of Lords, and especially that of Lord Cranworth, are really conclusive on the point.

The Courts of the United States have several times independently come to the same conclusion as the Irish cases: see Angell on Watercourses, 6th ed. pp. 160, 176, and *Haldeman* v. *Bruckhart*. (1)

If the course of an underground channel can be clearly inferred from that above ground there may be some right to restrain interference with it; otherwise there is none.

Buckmaster, *K.C.*, and *Austen-Cartmell*, for the plaintiffs. Apart from the Irish case, there is no authority directly bearing upon the point. The defendants' proposition must go to the length, that no landowner has any right to the water in a stream which flows under his land unless its course is known by common notoriety or scientific investigation exclusive of excavation, no matter how great the volume of water or how unalterable the banks of the stream may be. That is an impossible proposition. The law is the same for water in a defined channel whether that channel is above ground or below. In all the English cases cited only percolating water was in question: they were all cases regarding claims, either, of a man with rights in a stream, to have it fed with percolating water, or of the landowner to retain percolating water. There is no decision as to an underground stream. There are several dicta, and in some of them the word "known" is used; but it was not the intention of the judges to make knowledge a condition of the right: they only used the word as equivalent to definite or knowable. The right is always said to be a natural one, ex jure naturae, and it is impossible that a natural right should depend on knowledge. That is well brought out in the dissenting judgment of Coleridge J. in *Chasemore* v. *Richards* (2) before the Exchequer Chamber. (3) If the right depended on knowledge it might be possessed at one time and lost again through the death or forgetfulness of old persons who knew where the stream was. It is plain that if the action of *Black* v.

(1) (1863) 45 Penn. St. 514; 84 Amer. Dec. 511.

(2) 7 H. L. C. 349.

(3) (1857) 2 H. & N. 168, 186.

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Ballymena Township Commissioners (1) had been brought a few years later the knowledge of where the stream was would have disappeared.

Rawstron v. *Taylor* (2), which referred to surface water flowing above ground but not in a defined channel, shews that the defined nature of the channel is the only important point; and in *Broadbent* v. *Ramsbotham* (3) Alderson B. distinctly says that the plaintiff's right extended to "water flowing in some defined natural channel, either subterranean or on the surface." The only real question in the case of underground water is, Does it flow in such a channel as would give rights if it were above ground? In *Ewart* v. *Belfast Poor Law Guardians* (4) the judges draw a false inference from *Chasemore* v. *Richards* (5), attaching too much weight to the word "known."

Butcher, *K.C.*, in reply.

FARWELL J. (after stating the facts as above). The rights in relation to water flowing in a defined and known channel on or under the surface of the earth are now well settled; every riparian proprietor has an equal right to the ordinary use of the water which flows in the stream adjacent to his lands as it has been wont to run: *Miner* v. *Gilmour*. (6) This right is an incident to the property in the land through which it passes: *Embrey* v. *Owen* (7), and does not depend on a supposed grant, but is jure naturae: *Shury* v. *Piggot*. (8) But the right does not extend to water percolating through the strata in no known channels—*Chasemore* v. *Richards* (9)—or to common surface water rising out of springy or boggy ground and flowing in no definite channel: *Rawstron* v. *Taylor*. (2) No English authority has yet dealt with the rights to water flowing underground in a defined but unknown channel; and, although there is the express authority of the Court of Appeal in Ireland, I feel bound to form my own opinion on the point, as that decision does not bind me. After the manner in which the case of *Chase-*

(1) 17 L. R. Ir. 459.
(2) (1855) 11 Ex. 369.
(3) (1856) 11 Ex. 602.
(4) 9 L. R. Ir. 172.
(5) 7 H. L. C. 349.
(6) (1858) 12 Moo. P. C. 131.
(7) 6 Ex. 352, 368.
(8) 3 Bulst. 339.
(9) 7 H. L. C. 382.

more v. *Richards* (1) was argued and decided in the House of Lords, I cannot treat the right to the flow of the stream as founded on a rule of positive law, the origin of which is lost by the progress of time, as suggested by Tindal C.J. in *Acton* v. *Blundell* (2), but I feel bound to try to find the principle on which the right rests.

The foundation of the right as stated throughout all the cases is jus naturae; thus Whitlock J., in *Shury* v. *Piggot* (3), says: "A watercourse doth not begin by prescription, nor yet by assent, but the same doth begin ex jure naturae, having taken this course naturally, and cannot be averted." Lord Wensleydale, in *Chasemore* v. *Richards* (4), says: "It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself"; and Palles C.B. uses the same phrase in *Ewart* v. *Belfast Poor Law Guardians*. (5) What then is the meaning of jus naturae? It cannot be that it means merely that the water is an incident or accessory to the land by the gift of nature, for this would not be a sufficient foundation for the right claimed. The percolating waters in *Chasemore* v. *Richards* (1) and the surface water in *Rawstron* v. *Taylor* (6) are equally the gift of nature, and the former would by natural causes flow, to some extent at any rate, into the same stream. The winds of heaven blow over Blackacre by the gift of nature, but the proprietor cannot on that account prevent his neighbour from building on his own adjoining land and so checking their course: see *Bryant* v. *Lefever*. (7) It is plain, therefore, that the mere statement that water, light, or air is a gift of nature does not necessarily involve the general conclusion that there can be no interference with their enjoyment. I have come to the conclusion, therefore, that jus naturae is used in these cases as expressing that principle in English law which is akin to, if not derived from, the jus naturale of Roman law. English

(1) 7 H. L. C. 349.
(2) 12 M. & W. 324, 350.
(3) 3 Bulst. 339.
(4) 7 H. L. C. 382.
(5) 9 L. R. Ir. 185.
(6) 11 Ex. 369.
(7) (1879) 4 C. P. D. 172.

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law is, of course, quite independent of Roman law, but the conception of æquum et bonum and the rights flowing therefrom which are included in jus naturale underlie a great part of English common law; although it is not usual to find "the law of nature" or "natural law" referred to in so many words in English cases. Passing over Bracton and Azo and their placita de jure naturali (see Professor Maitland's Selections, Selden Society's publications, vol. 8, pp. 33 et seq.), Lord Mansfield in *Moses* v. *Macferlan* (1), explains the common count for money "had and received" as a kind of equitable action to recover back money which "ought not in justice to be kept. . . . . It lies only for money which, ex æquo et bono, the defendant ought to refund. . . . In one word, the gist of this kind of action is, that the defendant . . . . is obliged by the ties of natural justice and equity to refund the money." So Baron Martin in *Freeman* v. *Jeffries* (2), explains actions quasi ex contractu thus: "But for a long time implied contracts have been admitted into the law, where, a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a sum of money to the other." So the law merchant, says Buller J. in *Master* v. *Miller* (3), is "a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith"; and see an article on "The Law of Nature" by Sir F. Pollock in the "Journal of Comparative Legislation" for 1901. I am not, therefore, introducing any novel principle if I regard jus naturae on which the right to running water rests, as meaning that which is æquum et bonum between the upper and lower proprietors. This appears to me to be the view expressed by Dodderidge J. in *Shury* v. *Piggot* (4) when he gives a second reason—"drawn from the nature of water, the which will naturally descend, and will make a way for its passage if stopped." He is evidently considering the relative positions of the upper and lower owners. Each

(1) (1760) 2 Burr. 1005, 1012.
(2) (1869) L. R. 4 Ex. 189, 199.
(3) (1791) 4 T. R. 320, 342; 2 R. R. 399.
(4) 3 Bulst. 340.

has his rights jure naturae. If the upper owner dams the stream, the lower loses the passage of the water. If the lower owner dams the stream, he floods the higher owner's lands. What then is fair and reasonable between the parties? Aqua currit, i.e., it is obvious to all that the water in the known and definite channel runs down toward the lower ground, therefore debet currere ut currere solebat; it is æquum et bonum that neither owner should interfere with this, and thereby each avoids injuring the other and escapes injury himself.

This, too, is the only explanation of the continued reference to knowledge of the existence of the stream which occurs in the cases. Thus, in *Acton* v. *Blundell* (1) Tindal C.J. refers the origin of the law of running streams to the fact that the right enjoyed by the several proprietors of the lands over which they flow is and always has been "public and notorious." In *Chasemore* v. *Richards* (2) Lord Cranworth says that there is no difficulty in enforcing the right, because running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But I fail to see how ignorance or knowledge on the part of a defendant can affect the right of the plaintiff in a civil action to enforce his legal right except on the footing that the existence of such right depends on the consideration of what is æquum et bonum between the two parties.

In the present case there is a spring issuing from the defendant's land. It is fed ex hypothesi by a subterranean stream flowing in a defined channel from the higher ground. This higher ground may extend to a large number of acres and may belong to many different owners. No one can tell where or in whose land this hypothetical stream runs. If the plaintiffs are right, no proprietor of land above the spring can sink a well or make excavations on his own ground without the risk of incurring liability, possibly to a very large amount, to the plaintiffs for interfering with the spring; and this is a much larger liability than that unsuccessfully sought to be established in *Chasemore* v. *Richards* (2), for a defined underground stream

(1) 12 M. & W. 349. (2) 7 H. L. C. 349.

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may flow for miles, whereas the gathering ground of water penetrating by percolation is of comparatively small extent. I apply Lord Chelmsford's question in *Chasemore* v. *Richards* (1): "Are the most distant landowners, as well as the adjacent ones, to be bound, at their peril, to take care to use their lands so as not to interrupt the" passage "of the water through the soil to a greater extent than shall be necessary for their own actual wants?" And Lord Wensleydale's observation in the same case (2): "In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land." For with Coleridge J. (3), I do not see how the ignorance which the landowner has of the course of the springs or streams below the surface, of the changes they undergo, and of the date of their commencement, "is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but out of the nature of the thing itself." I desire respectfully to adopt Palles C.B.'s statement in *Ewart* v. *Belfast Poor Law Guardians* (4) when he says: "If the view which has been contended for by the plaintiff in this case is correct, we would have the startling doctrine, that an action at law would lie against a man, without any limit to the damages that could be recovered, for doing an act which, as far as he knows, or as far as can be known by reasonable inquiry, is a lawful act, and the unlawfulness of which would depend upon the fact that, by some newly discovered method of examination being resorted to, it was ascertained that the water flowed in a defined channel—a fact which but for that method being resorted to would have remained for all ages unknown. That would be a monstrous doctrine"; and FitzGibbon L.J.'s statement in the same case (5): "In my opinion it is impossible to recognise a natural

(1) 7 H. L. C. 375.
(2) Ibid. 387.
(3) 2 H. & N. 191.
(4) 9 L. R. Ir. 194.
(5) 9 L. R. Ir. 205.

right which would subject the lands of another to the burden of maintaining an unknown flow of water (whatever be the geological character of its channel), without introducing every difficulty which has already prevailed to prevent the recognition of such a right in respect of 'percolating' water, strictly so called. It appears to me impossible to find the test of the existence of . . . . natural rights . . . . in ex post facto geological investigations; yet it is by some such means alone that any difference could be discovered between oozing or percolating water and water running through or collecting in underground fissures."

There is nothing inconsistent with this view in cases like that of the river Mole, where a river disappears into the ground, and what is apparently the same river reappears on lower ground. In such cases there is a terminus a quo and a terminus ad quem, and the owners of land between the two and their riparian neighbours can fairly be presumed to know of the existence and course of the stream. As Pollock C.B. says in *Dickinson* v. *Grand Junction Canal Co.* (1): "If the course of a subterranean stream were well known, as is the case with many, which sink underground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground." That passage was cited with approval by Lord Chelmsford in *Chasemore* v. *Richards.* (2) At any rate cases of that class rest on the knowledge, actual or presumed, of the existence of an underground stream.

Finally, regarding the case as one to be decided on the general consideration of æquum et bonum, it is not immaterial to remember that three eminent judges of Appeal in Ireland have decided that it is not reasonable or right that the lower owner should have any right to prevent the obstruction of a subterranean stream flowing in a defined but unknown course, and that such view also accords with American decisions.

(1) 7 Ex. 300. (2) 7 H. L. C. 374.

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"The defined watercourses spoken of in *Wheatley* v. *Baugh* (1), which a man may not divert to the hurt of an inferior proprietor, are not the hidden streams of which the owner of the soil through which they pass can have no knowledge until they have been discovered by excavations made in the exercise of his rights of property": Angell on Watercourses, 6th ed. p. 160. I am at any rate confirmed in my view of what is æquum et bonum by finding that I share it with such eminent persons, although their opinions are not authorities behind which I can take shelter. There will be a declaration that there is no right in underground water where the course of its channel is unknown; and the plaintiffs will pay the costs of this application.

Solicitors for defendants: *Johnson, Weatherall & Sturt, for Wade, Bilbrough, Booth & Co., Bradford.*

Solicitors for plaintiffs: *Nussey & Fellowes, for Vint, Parkinson, Hill & Killick, Bradford.*

(1) 25 Penn. St. 528.

J. R. B.

BUCKLEY J.
1902
July 3, 4.

In re SMITH.
SMITH *v.* LEWIS.

[1902 S. 1401.]

Trustees—Investment—Breach of Trust—Shares in Limited Company—Reconstruction — Exchange of Shares in Old Company for Shares in New Company—Retainer of Shares—"Present Form of Investment."

The testator authorized his trustees to retain any part of his estate "in its present form of investment." At the time of his death he held 750 fully paid ordinary shares of 5*l.* each in a limited company which had no preference shares. These shares were of great value, and the trustees retained 520 of them. The company was subsequently reconstructed; the old company was wound up voluntarily, and a new company formed with the same name. All the assets of the old company were transferred to the new company; the new company carried on the business as before, and allotted to each member of the old company, in exchange for every fully paid share in the old company, one ordinary share of 5*l.* and one preference share of 5*l.* in the new company credited as fully paid. No alternative terms were offered by which shareholders might have received payment in cash instead of in shares. The trustees accepted the shares allotted to them in exchange for their shares in the old company. The preference shares in the new company were at the date of the hearing within the investment clause in the will. The question was whether the trustees had power to retain the ordinary shares in the new company:—

Held, that the ordinary shares in the new company were within the words "in its present form of investment," and that the trustees were justified in retaining them.

ADJOURNED SUMMONS.

Joseph Smith by his will gave all his real and personal estate to trustees upon trust to sell, call in, and convert the same, and after payment of debts and legacies to invest the residue of the proceeds in some of the investments thereinafter authorized, with power for the trustees to vary such investments. He declared that his "trustees may postpone the sale and conversion of my real and personal estate or any part thereof for so long as they shall think fit, and retain the same or any part thereof in its present form of investment." By the investment clause he declared that all moneys liable to be invested under the trusts of his will should be invested upon purchase of

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freehold hereditaments in England or Wales, or upon purchase of stocks, funds, or securities therein mentioned, "or the debentures or preference stock or shares of any joint stock company at the time of investment paying a dividend on the ordinary stock or shares of such railway, joint stock, or other company as aforesaid," or upon real or leasehold securities.

The testator died on April 21, 1895. At the time of his death he held 750 fully paid ordinary shares of 5*l.* each in the Birmingham Small Arms and Metal Company, Limited. The capital of this company consisted of 60,000 shares of 5*l.* each, and it had no preference shares; it was very successful, and the trustees retained 520 of the testator's shares. On September 3 and 22, 1896, the company, with a view to increasing its capital, passed resolutions for a reconstruction under a scheme by which the company was to be wound up voluntarily and the assets transferred to a new company. By an agreement of October 6, 1896, made between the old company and its liquidator of the one part, and the Birmingham Small Arms and Metal Company, Limited (thereinafter called "the new company"), of the other part, it was provided that the old company and its liquidator should transfer all its assets to the new company; the old company was to pay its debts up to July, 1896, and after that date the new company was to perform all the obligations and fulfil the contracts of the old company, and pay the costs of the winding-up and of forming the new company, and "allot to each member of the old company, or to his nominees, in respect of and in exchange for every share of 5*l.* fully paid in the old company held by each such member respectively, one ordinary share of 5*l.* in the new company credited as fully paid up, and one preference share of 5*l.* in the new company credited as fully paid up." No alternative terms were offered by which the shareholders might receive payment in cash instead of the new shares. The trustees felt that it would be for the benefit of the estate that they should accept the shares in the new company, and did not dissent from the resolutions under s. 161 of the Companies Act, 1862. 520 ordinary and 520 preference shares were accordingly allotted to them in respect of the testator's shares in the old company

which they had retained. They sold twenty of the preference shares and fifty of the ordinary shares, and kept the rest.

The capital of the new company was 79,370 ordinary shares of 5*l.* each, and 40,630 preference shares of 5*l.* each. In March, 1897, the new company began to pay dividends on its ordinary shares, and it had continued to do so since that date, and in October, 1897, it changed its name to that of "The Birmingham Small Arms Company, Limited."

It was admitted that the trustees acted rightly in accepting the shares, which were very valuable; but a question was raised whether they were empowered by the will to retain them, and this summons was taken out to settle that point amongst others.

J. E. Harman, for the surviving trustee.

M. Romer, for the tenants for life. It is not suggested that the trustees have been guilty of a breach of trust because they did not proceed under s. 161 to get the value of the shares instead of accepting the new shares. The question is whether the surviving trustee is entitled to retain the ordinary shares in the new company. We submit that they are substantially the same investment as that held by the testator. At the end of the reconstruction the shares were the same and the business was the same. There is no question about the preference shares, for in 1897, as soon as the new company began to pay dividends on the ordinary stock, the preference shares became, under the investment clause, securities which the trustee was authorized to buy.

It is said that *In re Morris* (1) is against me, but the facts of that case were quite different from those now before the Court. The old company had been an unlimited company, and it was held that the shares in that company as well as those in the new company were unauthorized securities. The reconstruction was under the Companies Act, 1879, and the trustees had an option whether they would take cash or shares.

R. J. Parker, for the infant remaindermen. I do not dispute

(1) (1885) 52 L. T. 462.

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that the trustee is entitled to retain the preference shares; but I contend that he has no power to keep the ordinary shares. The trustees acquired the shares although not by any active step of their own, and notwithstanding that they were bound to behave as they did.

[BUCKLEY J. Did not the testator himself acquire these shares, in the sense that he owned the shares which became these shares? If the testator's shares as a consequence of alterations resulting from something inherent in their constitution were converted into something else, can the trustees who did nothing actively be said to have acquired the altered thing?]

It is a question of construction. If they had had an option to take money, it might still have been best for the estate that they should take shares. That does not affect the question whether the shares ought to be retained. The trustees should have sold them at once, because on the true construction of the will they had no power to retain them. The shares in the new company are in themselves different from those in the old company. They are in a different position, for they are subject to preference shares; and they are shares in a different company.

[BUCKLEY J. The old company might have issued preference shares, and under the Companies (Memorandum of Association) Act, 1890, might have enlarged or altered its objects: would not the testator's money invested in its ordinary shares still have been in that case in the same "form of investment"?]

Yes; but here the old company has gone altogether. It is a question in each case whether on the particular facts the company remains the same. The power to retain shares does not apply to the new shares: *In re New.* (1) If a change takes place in the members constituting a partnership, it is no longer for this purpose the same firm: *In re Tucker.* (2) In *In re Morris* (3) the alteration was only by domestic legislation; but even so it was held that the shares could not be retained.

(1) [1901] 2 Ch. 534. (2) [1894] 1 Ch. 724.
(3) 52 L. T. 462.

BUCKLEY J. stated the facts, and continued:—The question is whether the plaintiff as surviving trustee is justified in retaining unsold the preference and ordinary shares thus allotted, on the ground that they come within the words "in its present form of investment." As regards the preference shares, the investment clause in the will includes "preference stock or shares of any joint stock company at the time of investment paying a dividend on the ordinary stock or shares of" the company. When these preference shares were issued in 1896, the company was not paying dividends on its ordinary shares; so that at that moment the preference shares were not authorized investments. But the company began to pay dividends on its ordinary shares in March, 1897; therefore, after that time they became authorized investments, and have so continued ever since; so that, even if the trustees ought to have sold them in 1896, they would have been entitled to buy them in 1897. That point, therefore, comes to nothing.

The further question is whether the ordinary shares ought to be retained. They are not within any clause which authorizes the trustees to make investments. So the question is whether these shares come within the words which authorize a retainer of the estate or any part thereof "in its present form of investment." Of course, shares in the new company are not shares in the old company; they are different shares. But that is not really an answer. I ought to look at the substance of the transaction. Has the money ever been shifted from one investment to another? Suppose that the company at the testator's death had only issued ordinary shares and subsequently (having power so to do) issued preference shares, would the ordinary shares still be the same form of investment? I should say Yes. The company had power to create preference shares; the ordinary shares were always subject to that power, and after the exercise of the power are still the same shares as before its exercise.

Suppose, further, that after the testator's death the company availed itself of the Companies (Memorandum of Association) Act, 1890, and enlarged its objects, would the investment be the same? I answer Yes. The investment was one which

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contained within itself the possibility of such an alteration. It would be the same investment with an alteration of the objects of the company in which the invested money was employed. The present case is not in its facts, but is in its principles within the above reasoning. The company in which the investment had been made by the testator was one which had under the statutes which governed it the powers given by s. 161 of the Companies Act, 1862. Since the testator's death the company has availed itself of those powers and has sold its business to a new company. It has effected that operation in such a form that the trustees were bound either to take the shares or to dissent, and get the value of them under ss. 161 and 162 of the Act of 1862. To dissent and require the value of the shares would have been in effect to sell the shares. The new shares came to the trustees because the testator held the old shares, and for no other reason. The shares in the new company resulted from the shares in the old company without any act on the part of the trustees, simply because they held the testator's shares. To get anything else they would have had actively to do something, namely, dissent within s. 161. The trustees, therefore, have not made the investment in the new shares. The altered thing that they have is the same investment in an altered form resulting from qualities inherent in the investment which their testator had. They are shares in another company, it is true. They are shares over which there are now preference shares; but they might have come into that position under the old company. The only real difference is that the corporation is a different corporation. Does that fact take these shares out of the words "retain in its present form of investment"? I think every case of this sort must be looked at on its merits in order to see whether the investment is the same. In the present case I think it is. The new company is simply a reproduction, a transformation, of the old company. The shares in question are very valuable, and it is admitted that the trustees undoubtedly did right in taking them. There is no difference in the form of business, no change from fully paid to partly paid shares, so as to cause additional liability. There is nothing of that sort. It is

merely that there is a new corporation which is the old company in a new form, and the trustees got the shares because, by the use made of the statute, the one replaced the other. I think the shares are within the words of the will, and the trustees are entitled to retain them.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Benjamin Shirley Smith, Birmingham.*

H. C. R.

JOYCE J. 1902 *July* 8, 29.

In re LAWLEY. ZAISER *v.* LAWLEY.

[1901 L. 2654.]

Power of Appointment — General Power — Exercise by Will — Covenant to exercise Power in a particular way as Security for Loan—Liability of appointed Fund to Debts.

The donee of a general testamentary power of appointment over a fund borrowed a sum of money, and as security for the loan covenanted forthwith to make a will exercising the power so that the loan should be a first charge upon the fund; and he made a will accordingly, and died:—

Held, that the fund had become assets for the payment of the testator's debts, and that the lender was not entitled to priority over the general creditors of the estate.

THE Hon. Francis Charles Lawley, under the will of his mother Lady Wenlock, had a general power to appoint by will a sum of 10,000*l.*, which in default of appointment was to go as part of her residuary estate. On April 7, 1892, he executed a mortgage in favour of Mr. G. F. Perkins to secure a loan of 1000*l.* with interest thereon at 8 per cent. By this mortgage he covenanted that he would immediately after the execution thereof sign his will, which was already prepared, bearing even date therewith, whereby, in exercise of his testamentary power of appointment under the will of his late mother, he appointed that the trustees of her will should stand possessed of the sum of 10,000*l.* and the investments representing the same, upon trust to pay to the mortgagee thereout, in preference and priority to all other payments, the said sum

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of 1000*l.* and all interest thereon, and that he would not revoke or alter his will without the consent in writing of the mortgagee. On the same day he executed his will containing the above provisions, and stating that it was his wish that the loan should be a first charge on the 10,000*l.*, and he died on September 18, 1901, without having altered or revoked his will save by certain codicils changing the names of his executors. Mr. Perkins was also dead. Shortly after Mr. Lawley's death the trustees of Lady Wenlock's will paid into court to the credit of this action—which was a creditor's action for the administration of Mr. Lawley's estate—certain bonds of the nominal value of 3200*l.*, representing a part of the 10,000*l.* over which Mr. Lawley had his testamentary power of appointment. The whole of the principal sum of 1000*l.*, together with arrears of interest, was still due under the mortgage of April 7, 1892. The question having arisen whether the estate of Mr. Perkins was by virtue of this mortgage entitled to priority over the general body of Mr. Lawley's creditors, Mr. Perkins' executors took out a summons in the administration action against Mr. Lawley's executors, asking for payment out of the fund in court of the sum due to them upon their security, or, in the alternative, that they might be admitted as creditors of the estate.

Badcock, K.C., and *E. Ford*, for the applicants. The general creditors of the testator claim this fund on the ground that, the testator having by his will exercised his general power of appointment over it, it has become assets for the payment of his debts. There are two answers to that claim. First, this case is taken out of the general rule by the acts of the appointor: *In re Newnham's Estate.* (1) There the donee of the power induced the trustees of the fund to advance to her a portion of the corpus, and then by will appointed the fund to them by way of indemnity, and it was held that, as the creditors could not get at the property except through the act of appointment, so they could not take it against the other acts of the appointor. Secondly, the rule only applies where the

(1) W. N. (1881) 69.

appointment is to volunteers: *In re Roper* (1), per Kay J. Where, as here, the appointment is for value, there is on principle no reason why a general testamentary power should not be exercised in such a way as to give the appointee a preferential right over the creditors.

H. Wace, for the respondents. It is an established rule that, if a man having a general power of appointment exercises it by will, the property becomes subject to the payment of his debts, and the appointee is a trustee for the creditors: Farwell on Powers, 2nd ed. pp. 254–5; *Jenney* v. *Andrews* (2); *Williams* v. *Lomas* (3); *Fleming* v. *Buchanan* (4); *In re Hodgson* (5); and it makes no difference whether the appointment is to a creditor or to a volunteer. In *In re Newnham's Estate* (6) the appointor was tenant for life of the fund, and the principle of the decision was that the appointor or her estate was not to receive the fund twice over. If the donee of a testamentary power can mortgage the funds subject to the power, that is in effect converting the power into a power to appoint by deed.

Badcock, K.C., in reply. *In re Newnham's Estate* (6) cannot be distinguished upon the ground suggested. In this case, also, the appointor has had the benefit of the 1000*l.* Why, then, should his creditors have it over again? It is obvious that he never intended them to come in. The creditors cannot accept the appointment so far as it makes the fund assets, and reject it so far as it gives the applicants a preference. They cannot approbate and reprobate.

Cur. adv. vult.

July 29. JOYCE J. (after stating the facts). The question is whether the applicants, who are the legal personal representatives of the lender, have, as against the appointed fund, any priority over other creditors.

In *Fleming* v. *Buchanan* (7) the law is thus laid down by Knight Bruce L.J.: "On whatever grounds it was originally

(1) (1888) 39 Ch. D. 482, 487.
(2) (1822) 6 Madd. 264; 23 R. R. 216.
(3) (1852) 16 Beav. 1.
(4) (1853) 3 D. M. & G. 976.
(5) [1899] 1 Ch. 666.
(6) W. N. (1881) 69.
(7) 3 D. M. & G. 980.

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so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part." The order there mentioned is the order in which assets generally are applied in payment of debts according to the table set out in Jarman on Wills, 5th ed. vol. ii. p. 1430. This statement of the law is not confined to the case of a power to appoint by will, but extends also to a power to appoint by deed or will when the appointment is made by will.

The earliest case I have found upon this subject is one of *Thompson* v. *Towne*. (1) There a testator at the time of his death having a power of appointment by will over a sum of 500*l*., exercised such power by his will in favour of legatees. The Lord Keeper Somers decreed this 500*l*. to be assets to pay the debt of the plaintiff, a creditor; and it is stated in the reports that on appeal to the House of Lords this decree was affirmed, but upon what precise grounds does not appear.

When the power is to appoint by deed or will, the appointee under an appointment by deed for good consideration takes in priority to creditors. Thus, for example, in *Lassells* v. *Lord Cornwallis* (2), Lord Cornwallis in the settlement on his marriage reserved a power to charge an estate with any sum not exceeding 3000*l*. for such purposes as he should think fit. Upon a sale, he by deed appointed this 3000*l*. to the purchaser as a collateral security for the enjoyment of his purchase, and, if no incumbrance arose, the appointment was to be void. No incumbrance having arisen, by his will he bequeathed the 3000*l*. The Lord Keeper Wright, following *Thompson* v. *Towne* (1), decreed the 3000*l*. to be assets of Lord Cornwallis, and, *subject to the collateral security*, to be applicable in payment of debts.

In *Daubeny* v. *Cockburn* (3) Sir William Grant speaks of the general equity of creditors to have what is appointed to a

(1) (1695) Prec. Ch. 52; 2 Eq. C. Ab. 466. (2) (1704) 2 Vern. 465.
(3) (1816) 1 Mer. 626, 639; 15 R. R. 174.

volunteer considered as assets if wanted for the payment of debts. So also in *Ewart* v. *Ewart* (1) Lord Hatherley, when Vice-Chancellor, states the result of the authorities to be as follows: "Where a person has a general power of appointment, the subject of the power being liable to his debts, and he executes the power in favour of volunteers, the Court draws out from the volunteers so much as is necessary for satisfying the debts"; and the Vice-Chancellor goes on to discuss the reasons and the authorities for that rule.

It is contended in the present case that the creditor who lent money upon the faith of the covenant is not a volunteer as against the appointed fund. But, although in the case of a general power to appoint by deed, or to appoint by deed or will, a contract to execute the power is aided as a defective execution, this is not so when the only power to appoint is by will. The granting of relief against the defective execution of a power is subject to the general rule that equity will not assist in defeating the intention of the person creating the power that no appointment should be made but by a revocable instrument: *Reid* v. *Shergold* (2) and *Cooper* v. *Martin* (3), per Rolt L.J.

If the applicants were to succeed in the present case, the result would practically be that a donee of a general power to appoint by will could always make an effectual appointment by an instrument inter vivos.

The Court will not decree specific performance of a covenant to execute a power where it is only a power to appoint by will. Such a covenant creates no specific charge, and a breach of it merely affords ground for a claim to damages: *In re Parkin* (4), an authority which is, I think, really decisive of the present case.

Much reliance was placed by the applicants upon the statement or dictum of Kay L.J., then Kay J., in *In re Roper* (5), where it is said: "There is no doubt that, in case of a man who has a general power of appointment and exercises it by will

(1) (1853) 11 Hare, 276, 284.
(2) (1805) 10 Ves. 370, 380.
(3) (1867) L. R. 3 Ch. 47, 57–8.
(4) [1892] 3 Ch. 510.
(5) 39 Ch. D. 487.

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in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts." I do not think, however, that it was intended there to make any distinction—in the case of an appointment by will—between an appointment to volunteers and one to other persons. If it was, I think the statement is inaccurate or misleading. The truth is that every one taking under an appointment by will, though a creditor, is merely a volunteer as between himself and the creditors. The books, no doubt, speak of a legacy for good consideration, e.g., a legacy to a widow in lieu of dower, or to a creditor in satisfaction of his debt, and when the other creditors have been paid, such legatees, as between themselves and other legatees, may be entitled to priority. Still, they are only legatees, and in respect of the legacy volunteers as between themselves and the general body of creditors.

The result, if I am right, is that the applicants have no priority as against the appointed fund over other creditors, and there must be a declaration accordingly.

Solicitors: *Beyfus & Beyfus; Dangerfield, Blythe & Hodgson.*

H. B. H.

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1902

July 19.

In re BARONESS LLANOVER'S WILL. HERBERT *v.* FRESHFIELD.

[1902 L. 837.]

Settled Land Act—Tenant for Life—Trust to keep up Mansion-house and permit A. to reside.

A testatrix devised certain mansion-houses to trustees, upon trust to keep up the same, and the gardens and grounds thereof, in a fit state for residence, paying the wages of all servants and persons employed by them for that purpose, and to permit her daughter at any time or from time to time during her life to reside at any of the said mansion-houses, and during such residence to pay her an annuity of 80*l.* a week:—

Held, that the daughter had the powers of a tenant for life under the Settled Land Acts.

Lady Llanover, the testatrix in this matter, by her will dated August 16, 1889, devised all her real estate to trustees, "upon trust" (clause 3) "to enter into possession or receipt of the rents and profits of or to manage or superintend the management of the same respectively." The will contained full powers for the trustees to manage the property, and let or sell or exchange all or any part thereof, except the mansion-houses hereinafter mentioned, and directed the trustees to pay certain annuities, including an annuity of 1000*l.* a year to her daughter Mrs. Herbert, and an additional 300*l.* a year during the joint lives of herself and her husband, and proceeded: (Clause 5) "I direct that, subject as aforesaid, my trustees or trustee shall apply such annual sum or sums of money as shall be necessary for keeping up the two mansion-houses, grounds, and gardens at Llanover, and also the residence and gardens called Abercarn Uchaf, and the mansion and premises in Great Stanhope Street in a fit state for residence, in accordance with such scale and rules (if any) as I may before my death have expressed orally or in writing (but so that any such written rules shall prevail over any oral rules), or otherwise in accordance with such a scale and rules as they or he may think fit (including in such keeping up the wages of all servants and

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other persons employed by my trustees or trustee in or about such mansion-houses, residences, grounds, and gardens, which servants and other persons shall be Welsh and speak the Welsh language, and shall not be of the Roman Catholic religion), and my trustees or trustee shall permit my daughter Augusta Charlotte Elizabeth Herbert (wife of John Arthur Herbert of Llanarth, Esquire) at any time and from time to time during her life to reside at the said mansion-house, gardens, and grounds at Llanover, the residence and gardens called Abercarn Uchaf, and the mansion and premises in Great Stanhope Street, and during any and every such residence at the mansion-houses, gardens, and grounds at Llanover, or at the mansion-house in Great Stanhope Street, by my said daughter, under such permission as aforesaid, my trustees or trustee shall out of the rents and profits (subject to the prior payments thereout hereinbefore directed) pay to my said daughter an allowance of 80*l.* per week during such residence if the surplus rents and profits shall be sufficient for that purpose, and if not then an allowance at the rate of so much per week as my trustees or trustee may in their or his absolute and uncontrolled discretion think that such surplus rents and profits can fairly bear, and subject as aforesaid my trustees or trustee shall during the life of my said daughter, but not for a period of more than twenty years after my death, apply the ultimate surplus, if any, of the said rents and profits in the manner by the tenth paragraph of this my will directed concerning the proceeds of my residuary property." The proceeds of the testatrix's residuary property were directed by paragraph 10 to be applied in payment off of incumbrances and purchase of real estate. The testatrix gave similar rights of residence to a granddaughter, grandson, and great-granddaughter successively, and subject thereto devised the said freehold hereditaments to the daughters of her great-granddaughter by a Protestant Trinitarian husband successively in tail male.

By a third codicil dated March 14, 1892, the testatrix gave directions for keeping up her mansion-house and grounds at Coldbrook, in the county of Monmouth, similar to those in the will relating to the other mansion-houses, and directed her

trustees to permit her granddaughter Miss Herbert, at any time, or from time to time, during her life, to reside therein.

The testatrix died on January 17, 1896.

The trustees had kept up the mansion-houses as directed by the will, and Mrs. Herbert, who had become a widow, had resided continuously in one or other of them.

The property left by the testatrix was very large; the surplus income after paying all annuities, including the 80*l.* a week to Mrs. Herbert, was about 12,000*l.* a year. There were mortgages on the estate for 100,000*l.*, and the accumulations amounted at the date of the summons to over 80,000*l.*

This summons was taken out by Mrs. Herbert for a declaration that she was entitled to exercise with respect to the mansion-houses the powers of a tenant for life under the Settled Land Acts.

Warmington, K.C., and *H. Fellows*, for Mrs. Herbert. Mrs. Herbert is a person having the powers of a tenant for life under the Settled Land Act. The direction in the will is imperative—"My trustees shall permit." Mrs. Herbert has a sole and exclusive right to reside in and enjoy the mansion-houses. The trustees are bound to keep them up, but they have no power to let or sell them, or to allow any one else to reside in them. She comes exactly within the definition in s. 58, sub-s. 1 (vi.): "A tenant for his own or any other life . . . . whose estate . . . . is subject to a trust for accumulation of income." The case is covered by *In re Eastman's Settled Estates* (1), which was adopted and followed by North J. in *In re Carne's Settled Estates*. (2) The last case is important, because North J. recognised that the decision would enable the tenant for life to sell the mansion-house and land round it, and leave the rest of the settled estates with an island in the middle of them belonging to a stranger, thus clearly defeating the intention of the settlor, and yet thought himself bound by *In re Eastman's Settled Estates*. (1)

It is true that in 1896 North J. decided, in chambers, that Miss Herbert had not the powers of a tenant for life under the

(1) W. N. (1898) 170 (15). (2) [1899] 1 Ch. 324.

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devise contained in the third codicil to this will. But that was before either of the cases cited, and the decision cannot stand with those cases.

Haldane, *K.C.*, and *Howard Wright*, for the trustees. The case falls into a different category from *In re Carne's Settled Estates* (1) and *In re Eastman's Settled Estates*. (2) If clause 5 of the will stood alone it would be nearer to those cases; but clause 3 distinctly directs the trustees to take possession, and gives them powers of management. Mrs. Herbert has no exclusive possession; she cannot exclude the trustees; she is not beneficially entitled to the mansion-houses; she has only a licence to reside there. In the cases cited the trustees had no powers of management. The definition of tenant for life in the Settled Land Act, s. 2, sub-s. 5, is "the person . . . . beneficially entitled to possession of settled land for his life," and the persons who under s. 58 have the powers of a tenant for life are all persons who have legal interests. That throws a light on what is meant by possession in the first definition.

SWINFEN EADY J. I am of opinion that the applicant has the powers of a tenant for life, within the meaning of the settled Land Act. I am unable to distinguish this case from *In re Eastman's Settled Estates* (2) or *In re Carne's Settled Estates* (1), which have been cited. True it is, in this case the trustees have the obligation imposed upon them by the will of keeping up the mansion-house, grounds, and premises in a fit state for residence, with the obligation of paying the wages of the servants indoors and outdoors employed by them for that purpose; but the plaintiff has the absolute right to occupy all or any of the premises in question. The words are, "the trustees shall permit" her. So, although in one sense she resides there by their permission, it is a permission which the will compels them to grant. She has the absolute right of living there.

Then it is said she has not the exclusive possession. I am of opinion that she is entitled to reside there, and no one else

(1) [1899] 1 Ch. 324. (2) W. N. (1898) 170 (15).

is. The trustees are not by the will empowered to let the property. The trustees do not claim, apparently, to go and reside there themselves and use it as their own house, and the plaintiff is the sole person who is entitled to reside there, and reside there in the way usual for a person in her station of life—that is, with personal servants, and with such other servants as the trustees may consider necessary for keeping the premises inside and outside in a proper state.

It is said her right to reside does not amount to possession; but s. 2, sub-s. 5, of the Settled Land Act includes the case of a tenant for life who has no right actually to enter the house at all. It may be let, and the tenant for life may be only in receipt of the rents and profits; still, such a tenant is beneficially entitled in possession within the meaning of the Act.

The mere fact that the obligation is imposed upon the trustees to keep up the house and the grounds and to pay for the necessary service does not, in my opinion, serve to distinguish this case from the two to which reference has been made.

It may be that the decision would have surprised the testatrix, and it may be, as Mr. Haldane has put it, that it is not in accordance with her intention; but the Settled Land Act overrides her intention. I determine, therefore, that the lady has the powers of a tenant for life within the meaning of the Settled Land Acts.

Solicitors for applicant: *Hunter & Haynes.*
Solicitors for trustees: *Freshfields.*

J. R. B.

C. A.
1902
SWINFEN EADY J.
April 26, 29.
C. A.
May 27, 28

In re McMURDO.
PENFIELD *v.* McMURDO.

[1899 M. 1718.]

Practice—Administration—Insolvent Estate—Secured Creditor—Withdrawal of Proof—Certificate—Application to restore Proof—Bankruptcy Rules—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II.—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Rules of Supreme Court, Order* LV., *rr.* 44, 57, 70, 71.

E. McMurdo died in 1889 insolvent, and an order was made for the administration of his estate. A creditor for 47,000*l.* held as security (inter alia) shares and debentures of the Delagoa Bay Railway. The railway was seized by the Portuguese Government, and an arbitration tribunal was appointed in 1891. The creditor declined to prove for his debt, and stated that he preferred to rely on his securities. In 1893 the chief clerk filed his certificate, in which the creditor's claim was entered as disallowed. In 1900 the award was made, and resulted in the creditor only receiving 1448*l.* in respect of his shares and debentures. In January, 1902, he took out a summons to vary the certificate by allowing his claim, and for liberty to prove for his debt:—

Held, by Swinfen Eady J., that the Chancery practice still applied to the administration of insolvent estates, although by s. 10 of the Judicature Act, 1875, the Bankruptcy Rules were also in force; therefore the creditor could not come in and prove after certificate, unless he shewed special circumstances in his favour; and that he had not done so:

Held, by the Court of Appeal, that under s. 10 of the Judicature Act, 1875, the Bankruptcy Rules applied to the case, and that under them the creditor could come in and prove at any time if there were assets undistributed, and if no injustice would be caused; that he could do the same thing in an administration in the Chancery Division; that, inasmuch as his debt had not been adjudicated upon, the disallowance of it in the certificate was not a fatal objection; that if it was necessary to shew special circumstances he had done so; that the certificate need not be varied; and that the creditor must be allowed upon terms to come in and prove.

Semble, a mortgagee of shares is not bound to watch the market so as to sell them at the highest price; and he does not by failing to sell at the most favourable opportunity lose his right to prove against the estate of the mortgagor.

Decision of Swinfen Eady J. reversed.

Edward McMurdo, the testator in this action, died in 1889, and on July 25, 1889, an order was made at the suit of a creditor for administration of his estate. The estate was

insolvent and the liabilities very large. The usual advertisements for creditors were issued, and in answer thereto, on March 29, 1890, the New Oriental Bank Corporation, Limited, sent in a claim for 31,575*l.* On May 11, 1891, the creditor, to whom on the marriage of the plaintiff with Mrs. McMurdo, the widow and executrix of the testator, the conduct of the proceedings had been given, served the bank with a notice to come in and prove their claim on May 29. On June 23, 1892, the bank went into voluntary liquidation, and Mr. T. A. Welton was appointed liquidator. The liquidator obtained several extensions of time to prove his claim, but on October 20, 1892, his solicitors wrote to the solicitors of the creditor having the conduct of the proceedings as follows: "Neither the liquidator of the New Oriental Bank nor Messrs. Bourke, Sandys & Co. will prove, preferring to rely upon the securities they hold, particularly understanding, as they do, that the assets available for unsecured creditors do not practically represent any dividend."

The bank held as security for their debt twelve debentures of the aggregate nominal value of 2000*l.*, and 6000 shares of the aggregate nominal value of 60,000*l.* of the Delagoa Bay and East African Railway Company which belonged to the testator. It was alleged that they also held as security 5000*l.* in shares of the Home and Colonial Assets and Debenture Corporation, 5000*l.* in shares of the Balkis Consolidated Company, and 5000*l.* in shares of the St. Augustine, Limited.

The railway and assets of the Delagoa Bay, &c., Railway Company were seized by the Portuguese Government, and an arbitration tribunal was appointed on June 13, 1891.

On December 2, 1892, the liquidator, by his solicitors, attended in chambers and formally withdrew his claim against the testator's estate. And on December 15, 1893, the chief clerk filed a certificate of debts, in which the liquidator's claim was entered as having been disallowed. Notice of the filing of this certificate and disallowance of the claim was given to the liquidator; but no application was made to vary the certificate.

The award in the Delagoa Bay, &c., arbitration was not made until 1900. It was very much less favourable to the

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company than had been generally expected, and on December 4, 1900, the liquidator received under the award 1448*l.* 6*s.* 7*d.*, being a dividend of 50 per cent. on the amount due upon the debentures held as security. There was evidence that nothing more would be received either on the debentures or the shares.

In December, 1901, the liquidator took out a summons for leave to prove his claim, notwithstanding the expiration of the time limited for making claims. This summons was dismissed by the master on December 16, 1901, on the ground that the summons did not ask to vary the certificate. The order for dismissal was drawn up and was not appealed from, and there was no application for leave to amend. On January 14, 1902, the liquidator took out a summons asking that, notwithstanding the times for applying to vary the certificate and making claims had expired, the certificate might be varied by allowing the applicant's claim, and that he might be at liberty to make and establish his claim. The sum claimed amounted to 47,198*l.* with interest.

On March 10, 1902, Swinfen Eady J. dismissed the summons in chambers, and the liquidator moved to discharge that order.

It appeared from the evidence that some of the other shares held by the bank, as well as the Delagoa Bay shares and debentures, though valueless at the date of the motion, had had a value since the date of the commencement of the action, and that within the same time the Delagoa Bay Railway 10*l.* shares might have been sold at 8*l.* 10*s.* and the debentures above par.

The motion was heard before Swinfen Eady J. on April 26, 1902.

Muir Mackenzie and *R. J. Parker*, for the liquidator. By virtue of s. 10 of the Judicature Act, 1875, this case must be governed by the rules "which are in force for the time being under the law of bankruptcy." Under those rules a creditor may always come in and prove at any time, so long as any part of the estate is undistributed and he does not disturb any previous dividends. The rules as to secured creditors—Bankruptcy Act, 1883, Sched. II., rr. 10–16—permit amendment of a valuation of a creditor's security at any time. They do not

expressly mention the right of a creditor, who simply stands aside and elects to rely on his security, to come in and prove at any time; but the Bankruptcy Rules of 1886 (rule 353) provide that where no other provision is made by the Act or these rules, the present law, procedure, and practice in bankruptcy matters shall remain in force. The rule in bankruptcy is perfectly clear; the only risk which a creditor ran by delaying his proof was that the estate might all be distributed; his right to come in and prove was undoubted: *In re Taylor* (1); *In re Lee* (2); *In re Kit Hill Tunnel* (3); and he is entitled as of right to revalue his security at any time: *In re Morter.* (4)

In re Hopkins (5) is a decision that the rules in bankruptcy apply to a case like this; but the Rules of 1869, which were then in force, did not allow amendment of valuation. If the Bankruptcy Rules apply, the existence of a certificate cannot make any difference: it is made merely for the convenience of the judge, and cannot affect a matter of right. If the estate were administered in bankruptcy under s. 125 of the Act of 1883, a creditor could come in at any time, and the rights of creditors of the same insolvent estate cannot be different, if the action is transferred to bankruptcy from what they would be if it was retained in the Chancery Division.

Even if the bankruptcy practice does not apply, the practice in Chancery was and is that a creditor will always be allowed to come in as long as any assets remain undistributed, unless there are special circumstances to exclude him: *Brown* v. *Lake* (6); *In re Metcalfe.* (7) He is not bound to shew special circumstances in favour of his admission: *Gillespie* v. *Alexander.* (8)

Jenkins, K.C., and *Whinney*, for the testator's executrix. The rule in Chancery is not that a creditor can come in at any time as a matter of course. Order LV., r. 44, excludes all creditors who do not come in to prove within the time fixed by advertisement; and Order LV., r. 70, makes a certificate

(1) (1860) 2 D. F. & J. 625.
(2) (1880) 14 Ch. D 82.
(3) (1881) 16 Ch. D. 590.
(4) (1897) 76 L. T. 532.
(5) (1881) 18 Ch. D. 370.
(6) (1847) 1 De G. & Sm. 144.
(7) (1879) 13 Ch. D. 236.
(8) (1827) 3 Russ. 130; 27 R. R. 35.

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absolutely binding; while rule 71 prevents hardship by giving the Court power, if special circumstances are shewn, to vary the certificate at any time. The old practice was the same: *Howell* v. *Kightley* (1); *David* v. *Frowd*. (2) A creditor was allowed to come in under special circumstances, if no injustice would be caused, and he could shew he was not guilty of wilful default. In *Brown* v. *Lake* (3) the Vice-Chancellor put his decision on the ground that the creditor had done nothing to preclude his coming in, but the circumstances were in fact very special: the creditor's claim was on a bond which the testator had executed as surety, and the bankruptcy of the principal, which apparently gave rise to the creditor's claim, took place long after the decree. In this case the applicant is in a much worse position than if he had merely stood aside. He has formally withdrawn and consented to a disallowance of his claim. If he had not done so he must have valued his security, and we could have had it realized. It would be gross injustice to let him come in now and be put in a better position than the creditors who had similar securities and valued them.

In re Metcalfe (4) shews that a man's conduct may be ground for refusing to allow him to come in. Here the applicant had no excuse whatever; it is not suggested that it was impossible to value his security: he merely did not think it expedient. Sect. 10 of the Judicature Act, 1875, has really nothing to do with the case. It specifies four cases in which the rules in bankruptcy are to apply; the question here has nothing to do with any of them: it is merely a question whether a man who deliberately chooses to have his claim disallowed is, years afterwards, to be allowed to come in and set up his claim again.

But if that section does apply, its effect is not to supersede the Chancery practice altogether, but to engraft certain rules upon it: see the judgment of Vaughan Williams L.J. in *In re Whitaker*. (5) *In re Hopkins* (6) is a direct authority that

(1) (1856) 8 D. M. & G. 325.
(2) (1833) 1 My. & K. 200; 36 R. R. 308.
(3) 1 De G. & Sm. 144.
(4) 13 Ch. D. 236.
(5) [1901] 1 Ch. 9, 12.
(6) 18 Ch. D. 370.

it does not affect the Chancery Rules as to the effect of the certificate.

The Bankruptcy Rules themselves preclude the bank from now coming in. Sched II., r. 1, provides that "every creditor shall prove his debt as soon as may be after the making of a receiving order"; and rule 16 provides that "if a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend." The bank have not complied with the rules, for they have neither valued, realized, nor abandoned their security. Rule 13 as to amending the valuation does not apply at all, for omission to value is not within the rule.

Upjohn, K.C., and *Eastwick*, for the creditor having the conduct of the action. The order of December 16, 1901, which has never been appealed from, is a complete bar to the present application.

Muir Mackenzie, in reply.

Cur. adv. vult.

April 29. SWINFEN EADY J., after stating the facts, proceeded:—Now, the claim is put by counsel for the applicant on this ground. They refer to s. 10 of the Judicature Act, 1875, which says that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." The contention is that the effect of that section is not only to incorporate the bankruptcy practice with the Chancery practice, but in substance to supersede the Chancery practice in the case of insolvent estates by the bankruptcy practice. It is contended that in bankruptcy a creditor has an absolute right of proof at any time not disturbing any dividend actually declared. That is to say, that

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so long as the creditor does not disturb any distribution already made, and so long as there are assets, he is entitled to come in and prove and receive a dividend. With regard to there being no certificate of debts in bankruptcy, the contention is that the certificate is in substance immaterial, and that even if the certificate had to be varied it ought to be varied in the present case, that such variation was mere matter of form, and that the creditor had an absolute right to come in and prove.

I am of opinion that that contention is not well founded, and that the Chancery practice is not superseded and replaced by the practice in bankruptcy in the administration of the estate of persons who have died insolvent. [His Lordship read shortly Order LV., rr. 44, 56, 57, 70, and 71, and proceeded:—]

I am of opinion that these rules extend to and apply to the cases of an insolvent estate. In the case of *In re Hopkins* (1) the Court of Appeal took that view. In that case a creditor had been admitted and his claim certified at 28*l*. He wished afterwards to increase his proof. The matter came before Fry J. in the first instance, and after considering whether, having regard to the right of secured and unsecured creditors in bankruptcy, the creditor was entitled to do that, Fry J. dealt with the certificate, and he said: "It appears to me, therefore, that by taking the certificate in the form in which they have, and not excepting to that certificate, and not attempting to vary it, they have exercised their right of election to treat the property as being of the value of 1800*l*. That being so, I ought not to release them from their election unless under circumstances which prove to me that there has been that mistake which would require the Court to relieve them. I think that the Court does not release persons who have elected under such circumstances, except upon the ground of mistake." Then he says: "I will make this observation, that if the plaintiffs have a case to shew that they elected under undue pressure or by mistake, I do not preclude them by this judgment from bringing forward that case." The applicants did take out a summons to vary the chief clerk's certificate, on the ground that they had acted under pressure

(1) 18 Ch. D. 370, 375.

and mistake. That summons came before Fry J., and was dismissed.

Then there was an appeal to the Court of Appeal from both orders. After referring to the bankruptcy practice, Sir George Jessel states the effect of a certificate in the administration of an insolvent estate thus (1): "The chief clerk makes a certificate of debts, and at that time it generally is well known whether the estate is solvent or not. There are exceptional cases, but it is impossible either to legislate for them or lay down rules to govern them. The chief clerk must proceed on the footing that the estate is solvent or that it is insolvent, for in one case interest is allowed on debts not carrying interest, and in the other it is not. Until the certificate of debts is made the creditor has a locus pœnitentiæ. Up to that time he may alter his proof, but after certificate he is bound, and every one else is bound, unless there are special grounds for setting aside the certificate." Then he says: "The judgment of Mr. Justice Fry unfortunately suggested to the plaintiff that there might be a case for setting aside the certificate, for which I cannot see the slightest ground. As to pressure, there was no pressure by the chief clerk; he only called upon the plaintiff to do what the law required him to do." Baggallay L.J. takes the same view. He says with regard to the proceedings of the creditor (2): "He let the proceedings go on to certificate, and by the certificate he was found a creditor for 28*l.*, the difference between his debt and the value set by him on his security, and by that he is bound. There was, in my opinion, nothing to entitle him to relief on the ground of pressure or mistake." Now, I consider it to be established that all creditors are bound by the certificate, including a creditor upon an insolvent estate who has put in a claim and has consented to its being disallowed.

The question, nevertheless, arises whether, according to the Chancery practice, apart from the rules in bankruptcy, the claimant ought, notwithstanding the certificate, to be let in to prove. Counsel for the applicant pressed me that the rule was that a creditor was entitled to come in, and had a right to come in always unless precluded by special circumstances.

(1) 18 Ch. D. 378. (2) 18 Ch. D. 380.

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I am of opinion that that is not the true rule, and that a creditor is not entitled to come in after certificate unless he can make a special case—that is to say, unless within the meaning of rule 71 the special circumstances of the case require it; in other words, it is for him to shew that under the special circumstances of the case he is entitled, notwithstanding the certificate, to be admitted a creditor; he is not entitled to come in, unless there are some special circumstances entitling him. In *David* v. *Frowd* (1) the Master of the Rolls, Sir John Leach, dealt with the practice of the Court of Chancery. He said: "Upon the application of any person claiming to be interested, the Court refers it to the master to inquire who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the master within reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the master, established an apparent title. Such proceedings having been taken, the Court will protect the administrator against any further claim. But it is obvious, that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the Court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it. It is for this reason that if a party, who has not gone in before the master applies to the Court after the master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of wilful

(1) 1 My. & K. 200, 208; 36 R. R. 308.

default in not claiming before the master, the Court will refer it to the master to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the master. This is every day's practice with respect to creditors." So that he limits it to a person who has not gone in before the masters, and who makes out that he has not been guilty of wilful default.

Several cases were referred to in which under special circumstances creditors had been allowed to come in. In *Gillespie* v. *Alexander* (1) there had originally been an admission of assets, and the creditor was let in, not to the full extent that had been allowed by the Master of the Rolls, but he was let in to the extent of a part of his debt, and proportionate to the part of the estate which remained in court. Lord Eldon says: "Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all." In that particular case some legatees had been paid their legacies, but with regard to others by reason of infancy their legacies were retained in court and carried over to a separate account, and the creditor was allowed to come in as against those legatees whose legacies still remained in court for the rateable proportion of the debt that ought to have been borne by such legatees. So in *Brown* v. *Lake* (2) a creditor was let in by Knight Bruce V.-C., but the Vice-Chancellor said that there was no ground whatever for saying that the creditor had precluded himself; and in that case the bankruptcy of Quincy, to whom the creditor had

(1) 3 Russ. 130, 136; 27 R. R. 35. (2) 1 De G. & Sm. 144.

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looked for payment, and who had paid the interest, secured after the order on further directions so that those were special circumstances there. And so in *In re Metcalfe* (1) the claim was admitted under special circumstances of mistake. The general rule with regard to certificates and the effect of a certificate was stated by Knight Bruce L.J. in *Howell* v. *Kightley* (2): "At the end of eight days the certificate was in the condition of a report confirmed absolutely, and therefore could not be discharged or varied except upon special grounds." I determine that the claimants, if they are to be entitled to come in at this date, must shew some special circumstances why this indulgence should be accorded to them. Now, when the facts of the case are examined, I am of opinion, not only that no special circumstances are made out for admitting the claim, but that very special circumstances are made out for not doing so. The deceased, Edward McMurdo, died so long ago as 1889. A very long time has elapsed since the judgment, not from undue delay in the proceedings, but because they have been necessarily retarded by reason of the Delagoa Bay Arbitration. But the result has been to delay for a very long period the distribution of the small assets among a very large body of creditors. The funds in court are 38,000*l.*, but are subject to heavy costs. There are 160 admitted claims amounting to 256,000*l.* and eighty-four claims have been disallowed. If this application were allowed the claim would have to go back to the master to be investigated, and this would cause considerable delay, for it is plain that the bank held other securities for their debt, which the liquidator, no doubt by mistake, has omitted to mention. If this claim is to be admitted upon the ground that the result of the Delagoa Bay Arbitration is not so favourable to the holders of Delagoa Bay securities as was anticipated, other claims must be dealt with on the same footing. And, moreover, the claimants have obtained a considerable advantage over other creditors who elected to prove, because they have not had to value their securities; if they had turned out more valuable, they would have obtained the benefit.

(1) 13 Ch. D. 236. (2) 8 D. M. & G. 325, 326.

Having regard to the facts that no case of mistake or surprise is made out, and that the claimants, who knew the facts, deliberately elected to withdraw their claim and consented to its being disallowed, and to the other special matters to which I have referred, I am of opinion that it would be exceedingly wrong to admit the claim at the present time. The motion must be dismissed with costs.

J. R. B.

The liquidator appealed, and asked that the order of April 29, 1902, might be reversed, and in lieu thereof that the order dated March 10, 1902, and made at chambers, whereby his summons of January 14, 1902, was dismissed, might be ordered to be discharged, and that an order might be made in accordance with that summons.

The appeal was heard on May 27, 28, 1902. C. A.

Muir Mackenzie, and *R. J. Parker*, for the liquidator, after urging the same arguments and referring to the same cases as in the Court below, continued:—*In re Hopkins* (1), relied on by the learned judge below, is not really in point; for it was a case under the Bankruptcy Act, 1869, under which a valuation of his security by a creditor bound him once for all. Then the learned judge says that, according to the practice in Chancery, the creditor is not entitled to come in after certificate unless he can make a special case, and for that he relies upon the opinion expressed by Sir John Leach M.R. in *David* v. *Frowd* (2); but the meaning of that case is that the creditor, in order to be allowed to come in, must shew "that he has not been guilty of wilful default" in not having claimed before; it does not mean that he must shew special circumstances in his favour. A creditor can always come in, "on terms," unless by his conduct he is estopped: *Gillespie* v. *Alexander*. (3) The error in the judgment of the learned judge below is that it ignores the old Chancery rule that a creditor may, so long as there are assets

(1) 18 Ch. D. 370. (2) 1 My. & K. 200, 208; 36 R. R. 308.
(3) 3 Russ. 130, 136; 27 R. R. 35.

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undistributed, come in and rank against those assets, and that this may be done after certificate, and even after further consideration. *Brown* v. *Lake* (1) is a good illustration of the terms the Court imposes so as to do what is equitable between all parties where a creditor comes in out of time. There will be nothing inequitable here, as between the appellant and the other creditors, in allowing him to come in; on the contrary, great injustice would be done to him if not allowed to come in. Under the Bankruptcy Rules he could come in at any time: why, then, should the master, by making a certificate as to debts, whether it be made early or late, alter the rights of the parties? To introduce the Chancery practice so as to interfere with the rights and remedies in bankruptcy would be to do great violence to s. 10 of the Judicature Act, 1875, and cause great injustice to the parties.

Upjohn, K.C., and *Eastwick*, for the creditor having the conduct of the proceedings. We submit that the decision of the learned judge was right. Sect. 10 of the Judicature Act, 1875, should not be construed as imparting bankruptcy practice and procedure into Chancery administration actions, the practice and procedure in which are regulated by special rules. The question is, Has the appellant brought himself within the rule as to opening the certificate: Order LV., r. 71? Rule 70 says that the certificate, when filed, shall be "binding on all the parties," unless discharged or varied; and then, under rule 71, the judge has power to discharge or vary it "if the special circumstances of the case require it." So that the party seeking to have it discharged or varied must shew "special circumstances." There is no case where the doctrine of *Gillespie* v. *Alexander* (2) has been applied to a certificate made on the footing that a particular claim, the subject of the certificate, has been actually disallowed.

[STIRLING L.J. *In re Metcalfe* (3) comes very near it.]

There does not appear to have been any certificate in that case; and there were very special circumstances which led the Court to allow the creditor to come in after time. Here the

(1) 1 De G. & Sm. 144. (2) 3 Russ. 130, 136; 27 R. R. 35.
(3) 13 Ch. D. 236.

creditor never attempted to prove until at least a year after the Delagoa Bay award, and he attended before the master and formally withdrew his claim; so that he cannot now allege "special circumstances" as a ground for reopening it. *Gillespie* v. *Alexander* (1) shews that the practice of the Court in administration is not to delay the distribution of the assets among the persons found to be entitled.

In *In re Hopkins* (2) there was a certificate which was held to be binding on all parties, and could not be set aside except on "special grounds."

[VAUGHAN WILLIAMS L.J. Clause 13 of the 2nd schedule to the Bankruptcy Act, 1883, says that a creditor who has valued his security may amend his valuation and proof "at any time," on satisfying the Court that they were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation. Does not that apply here?]

No; because in Chancery there is a certificate, whereas in bankruptcy there is not.

[They also contended that the whole question had been disposed of by the order of December 16, 1901, and that it was too late to appeal from that order.]

Jenkins, K.C., and *Whinney*, for the testator's executrix. We adopt the arguments which have been urged on behalf of the creditor who has the conduct of the proceedings. Even if this were a bankruptcy, and there was no question about the certificate, the appellants could not now come in and prove. If a secured creditor realizes his security or values his security he can prove for the balance of the debt; or if he gives up his security he can prove for the whole, and a proper time will be allowed for so doing. But if he chooses to rely on his security as distinguished from realizing it, he cannot afterwards change his mind and come in and prove. Under rule 1 of the 2nd schedule to the Bankruptcy Act, 1883, "every creditor shall prove his debt as soon as may be"; and by rule 16, if he does not comply with that rule he is excluded. The policy of the Act is not to deprive a secured creditor of his rights, but to

(1) 3 Russ. 130, 136; 27 R. R. 35. (2) 18 Ch. D. 370.

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make him act in such a way as to treat the other creditors fairly; and if he elects to rely on his security he is bound by that election, unless he shews special circumstances.

[STIRLING L.J. Sect. 61 of the Act of 1883 is inconsistent with your contention.]

Failing to prove as soon as possible creates an estoppel. Bankruptcy and Chancery practice are the same on this point. According to Chancery practice, mere delay will not prejudice him; but other things will prejudice him. He can only prove if he is not in default; after the certificate he must make a case for being allowed to prove, and must ask for leave from the Court: *In re Metcalfe* (1); *David* v. *Frowd.* (2) It would have been different if the appellants had put a value upon their security, so that we could have taken it over. There has been wilful default, which should be fatal to this appeal both in bankruptcy and Chancery. If the appeal is allowed, it should be on strict terms.

No reply was called for.

VAUGHAN WILLIAMS L.J., referred to the facts, and said that in order to get over the objection that this was res judicata, the Court would extend the time for appealing from the order of December 16, 1901, and continued:—Having said that, I will now proceed to deal with the merits of the case. It really is not denied that in this case the 10th section of the Act of 1875 applies, and that we must if it makes any difference deal with this question as it would be dealt with upon a proof being tendered in bankruptcy. I say if it makes any difference, because I am not at all sure myself that it makes any difference whatsoever. I will first deal with the matter as if the case were simply a case of a proof in bankruptcy. What were the circumstances of this case? The liquidator of the Oriental Bank Corporation was a secured creditor, and he held Delagoa Bay Railway bonds and some other securities, the names of which are not material here. At the moment of the commencement of this administration it was very uncertain what the value of the Delagoa Bay Railway bonds might be. The question had been referred

(1) 13 Ch. D. 236. (2) 1 My. & K. 200; 36 R. R. 308.

to arbitration as to what sum was to be paid by the Portuguese Government to the bondholders, and the value of these securities necessarily depended upon this—one might almost call it—international arbitration. It was not known what sum might be awarded, or how soon it might be awarded. In fact, the arbitration occupied some eight years. Under those circumstances it was not really for the interest of either the creditors of the estate, or anybody else who was interested in the estate of Colonel McMurdo, that the administration should take place without the value of these bonds being ascertained. Under those circumstances, the liquidator having made a claim, a certificate was made in which, to put it shortly, this claim was stated to be disallowed. At that moment the liquidator as creditor in the administration really was not, at all events according to the bankruptcy code, in a position to prove at all. He could not prove without realizing or valuing his security, and he had not done either one or the other, and therefore the claim was disallowed. No one suggests that this disallowance amounted to any adjudication upon the merits in respect of the right to prove. It was merely a declaration that rebus sic stantibus there was no right of proof. Under those circumstances it does not seem to me that the liquidator allowed an unreasonable time to elapse after the award had been made before he applied for leave.

Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the Court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the Court. If that is so, leave

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must be granted upon such terms as the Court may think just. That undoubtedly being the general rule, it is said against it that, by the 1st rule of the 2nd schedule to the Bankruptcy Act of 1883, "every creditor shall prove his debt as soon as may be after the making of a receiving order," and it is suggested that the result of that rule is that, if the creditor does not come in as soon as may be after the making of the receiving order, his right of proof is gone. Now, in answer to that there is, first, the section which Stirling L.J. called attention to in the course of the argument—the 61st section of the Act: "Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend," &c. And, moreover, if you take the rules with regard to proof in the 2nd schedule as a whole, to my mind it is perfectly plain that the 1st rule of the 2nd schedule cannot receive such a construction as is sought to be put upon it. It is merely a directory clause—a clause the non-compliance with which does not in any way deprive any creditor of a right or limit his right.

Another point that was made affects the proof whether it is looked at as a proof in bankruptcy or whether it is looked at as a proof under an administration in Chancery. It was said that, although it might be that there was a general rule that a creditor might come in and prove at any time, provided he did not disturb prior distributions, and, in some cases, provided proper terms were imposed, yet all this was overriden because the creditor might, subsequently to the commencement of the arbitration, have so conducted himself as to estop himself from bringing in the proof. It was said that he might have so acted as practically to have irrevocably agreed that he never would bring in a proof. I am not prepared to say that that is not a possible state of things; but the plain answer in this case is that, although that may be theoretically possible, there is not any ground whatsoever for saying that by words or by conduct the liquidator ever did agree, or did lead those who were interested in the administration to suppose that he agreed, that he would never carry in a proof.

Then it is suggested further that these securities, while they were in the control of the creditor, might have been dealt with by him, and at one time were of greater realizable value than they are now. I say nothing about the fact. I daresay that is the truth; but it seems to me that it is impossible to say that, because the securities have altered in value, that in any way estops the creditor from carrying in a proof here. We have not to decide at the present moment, and I shall not express any opinion as to whether it is possible, when the proof is carried in, that in some way or other this altered value may not have to be taken into consideration; but for the purpose of to-day I need not deal with that question.

I have now said all I have to say about the proof, looking at it as a proof in bankruptcy. Now let us look at it as a proof in an administration, and I shall really say very little upon this part of the case because my brethren are so much more competent to deal with it than I am; but I wish to say for myself that, having regard to the authorities that have been cited to us in reference to the practice in administrations, it seems to me that there is not the slightest ground for saying that the disallowance in a certificate like this of the claim to prove—a disallowance which it is not suggested was based in any way upon an adjudication on any merits of any sort or kind—is a fact which interferes with the right to carry in a proof subsequently in the administration. It is quite true that the effect of the certificate is that the creditor, not having come in within the time limited, has no longer any right to the benefit of the order or decree without some subsequent order by the Court, some supplementary certificate, and, in effect, what is being asked for here is a supplementary certificate. I say again that, upon the authorities that have been cited to us, including the authority of Lord Eldon in *Gillespie* v. *Alexander* (1), it is plain that the right to apply for leave to prove, to put it shortly, out of time is a right which has been recognised again and again in administrations. Under those circumstances, I really do not think that it makes very much difference whether one looks at this proof as if it were

(1) 3 Russ. 130; 27 R. R. 35.

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carried in in bankruptcy or carried in in the administration in Chancery. In either case it seems to me that, by the machinery of what is in effect a supplementary certificate, upon proper terms the Court would allow the creditor to come in.

As to the other points that were raised to the effect that there was some estoppel, or some alteration in circumstances, which should prevent the creditor from proving now, the observations that I have made upon this subject with regard to the proof in bankruptcy apply equally to the proof in the administration. It seems to me that the whole argument to the contrary—the argument, I mean, which sought to treat the certificate as if it was something binding which prevented the liquidator from proving now—was based upon a misapprehension of what the certificate was intended to do. It should be remembered, to my mind, that primâ facie the object of the certificate is not to decide a question as to the rights of the creditors. Primâ facie the object of the certificate is to protect those who have to administer the estate. Of course there may be cases in which, in truth and in fact, merits have been adjudicated upon before the certificate is given, and in that case a supplementary certificate, I take it, would certainly be refused; but, according to my judgment, the view which seems to have been taken on the order of December 16, 1901, that the certificate which was issued early in these proceedings raised some fatal objection to the proof of the creditor, an objection which could not be removed by a supplementary certificate, has no justification whatsoever in either theory or practice.

Now, there is only one other matter which I ought to mention; but there, again, I feel that the matter can be so much better dealt with by my brethren than by me, with their greater familiarity with the Chancery practice, that I propose to put my view very shortly. It was said that rule 57 of Order LV. only applied to cases arising before the actual certificate had been given, and that that threw one upon rules 70 and 71; that the moment you had got the certificate it was binding upon all parties, and could only be got rid of by the exercise of the powers given to the judge under rule 71:

"The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied," &c.; and that in the present case there were no such special circumstances. It does seem to me that one need not really take any exception to the argument upon this point, although I must not be taken as entirely agreeing with it; but I think one need not take any exception to it on the circumstances of this case; for, if it be true that under rule 71 there must be special circumstances, and that this certificate, which really adjudicated upon nothing whatsoever, is binding upon the creditor just as if it had been an adjudication in substance, if all that is true, we have special circumstances here, and we have a state of things where, by the lapse of time, it would be right to exercise the powers under rule 57, and give special leave as provided by the Act.

Under these circumstances, the view we take is that the leave ought now to be given as asked for in this summons of January 14, it being taken that by our order the time for appealing against the order of December 16, 1901, is extended, and that this summons is dealt with as if framed upon such an extension of time for appealing.

The proper terms will be dealt with after my brethren have given their judgment.

ROMER L.J. I also think that on terms the appellant should be allowed to come in and prove. I will first consider what took place in the early days of the proceedings in this administration action. The appellant intimated his intention to prove his debt for its full amount. He was then required by the administrator (the creditor having the conduct of the proceedings) to prove his debt. He then had to consider his position, having regard to the fact that the estate was insolvent and that he held securities. Now, what ensued appears to me to be in substance this. The appellant found what was obvious, that, in accordance with the Bankruptcy Rules which applied to this case, he could not come in and prove without valuing his security; and at that time he appears to me to have come

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to the conclusion that his security was equal to or greater in value than the amount of his debt, and that thereupon he announced his intention of not proving, and withdrawing his claim to prove. That was assented to, and then before the master his claim was, as it is said, disallowed. Thereupon, when the certificate came to be made by the master, he entered in the certificate this claim as having been made and having been disallowed. We now, therefore, know what the meaning of the word "disallowed" is in this certificate. It means what I have stated and no more. It does not amount to an adjudication on the question of debt or no debt. It is not a matter of adjudication in the true sense. This is not a case of res judicata being pleadable as against the appellant.

Then, if he is not prevented from asking for leave to prove on that ground, I next will consider whether his then determination not to prove because of what he then considered to be the value of his security ought to be taken as against him as final and irrevocable, so that when he subsequently found that his security did not realize what he had hoped it would, and did not suffice nearly to pay his debt, he should be held debarred from all opportunity under that change of circumstances from coming in and proving for the balance of his debt. I think that what then took place could not be held to so prevent him. To my mind, it was a mere case of a secured creditor resolving not to prove because at the time he valued his security as being equal to or greater than the amount of his debt; and no doubt at that time he probably did not contemplate that there would be any necessity at any time thereafter for his having to come in and prove because of any possible change in the value of the security or in the amount it would realize. But that is a very different thing from saying that he must be thereby taken to have resolved and elected never to come in and attempt to prove, even if it should turn out that, contrary to his anticipation, the property realized less than the amount of his debt. It seems to me that we cannot, and ought not, to draw such a conclusion from his acts on that occasion.

That being so, I pause to consider whether upon any other

ground he ought to be estopped by his then determination of withdrawing his proof from coming forward now under existing circumstances and asking to be allowed to prove. I think not; for I wish to point out that this was not a case of a bargain between the administrator and the creditor. It was not as if anything in the nature of a contract had been made, express or implied, whereby the creditor withdrew his proof on the terms of retaining his security—nothing of the sort. He simply did not prove for the reason I have stated, and for no other reason, and the rights of the parties remained wholly unchanged by what he then did. Had the value of the assets gone up even beyond the then expectation of the creditor, the administrator at any time could have come forward and called on him to hand over all the securities on being paid the amount of his debt.

Now, that being so, I will treat this in the first place as if it had been a case of bankruptcy pure and simple. To my mind, having regard to the 2nd schedule to the Bankruptcy Act of 1883, the Legislature clearly contemplated the right of a creditor, on any alteration during the bankruptcy in the value of his security by realization of that security or otherwise, to be allowed to readjust his claim—of course, not by so doing thereby creating any injustice to the other parties, and of course not interfering with anything that had been done as to dividend or otherwise prior to the change of proof. And it could not be said that merely because the creditor had originally valued his security as being greater than his debt, or equal to it, he was thereby for ever prevented from coming in and proving when it turned out, by realization or otherwise, that his security was insufficient to pay his debt. Of course the Court of Bankruptcy would have had power to impose terms, if terms had been necessary, and, in such a case, in the absence of any special circumstances which would render it unjust to allow the creditor to come in, he would and ought to have been allowed in bankruptcy to come in; and the bankruptcy practice would clearly have allowed him to do so. It is said that rule 1 of the 2nd schedule would have stopped the creditor, in such a case, from coming in and proving. That

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rule, to my mind, has not such a hard and fast effect as the respondents here would seek to attribute to it. That rule must be read with the other rules. Rule 1 is a very general rule. It applies to all creditors, and, of course, was not dealing with secured creditors more than it was with any other creditor, and no one could reasonably contend that, by reason of rule 1, an ordinary creditor, by mere delay in coming in and proving his debt, would thereby altogether lose his right of coming in at all as against undistributed assets in a case where otherwise no injustice would be done. As a rule, no injustice is done when a creditor comes in, for the Bankruptcy Court can always impose terms which will prevent any unnecessary delay in the administration of the estate in bankruptcy being caused by the lateness of the creditor coming in, and, as a rule, subject, as I have said, to care being taken that no injustice is done, by special order the Court of Bankruptcy will undoubtedly, notwithstanding rule 1, allow a creditor, notwithstanding his delay, to come in and prove and share in undistributed assets. I will not say that there may not be special circumstances that might justify the Bankruptcy Court in refusing to admit a creditor who came in late; but I have stated what I conceive to be the general rule and practice of the Bankruptcy Court.

Now, are there any special circumstances in this immediate case which would have justified the Bankruptcy Court—and, as far as I am dealing with this part of the case, the same meaning applies to the application though it is made in Chancery—which would render it proper that the Court should say to the creditor, "You ought not to come in and prove at all"? I think not.

In the first place, no doubt, there has been considerable delay; but this is a very peculiar case. The principal security consisted of debentures and shares in the Delagoa Bay Railway. That railway, as we know, was seized by the Portuguese Government, and a fund was found by the Portuguese Government; and the parties entitled to share in it had to be ascertained by arbitration. What the secured creditor, the appellant here, did was this: He waited the result of the

arbitration; he waited to see what sum would be awarded to him in respect of his holdings in the railway under the award of the arbitrator. Was that an unreasonable course for him to take? I think not. Was it a course which a mortgagee, acting reasonably and properly, would be entitled to take? I think it was.

And indeed, curiously enough, in this very case, the very same course has been adopted, and I think rightly so, by the administrator in this very action, acting, of course, under the direction of the Court. For part of the assets of the testator in this case were holdings in this very railway, and we have been told, and I have no doubt accurately, that the delay that has arisen in winding up this estate is partly, if not chiefly, due to the fact that the award had to be waited for, and the funds awarded in respect of the testator's holding in the railway had to be sent over here before the estate could be finally wound up.

Under those cirumstances, can it be said that, by reason of the delay, the appellant ought not to be allowed to come forward now, when the funds in court have not been distributed, and ask, under the circumstances, that he, as a creditor who has not been paid by his security, should be allowed to share as against the undistributed balance? I think not, assuming always that care is taken by terms not to allow the winding-up of this estate to be further delayed by reason of the delay in the appellant making his present application for leave to prove. If the appellant is allowed to come in and prove, no injustice will be done. There has been no change of parties. The only thing that can be said which would require the Court's attention in dealing with the matter specially is the fear that the delay of the appellant may lead to further delay in the administration of the estate; and that can be properly guarded against.

Now, there was one other point taken on behalf of the respondents which must be alluded to, though I do not think it amounted to the essence of the case.

It was said that the liquidator had other securities besides the securities of the Delagoa Bay Railway to which I have

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referred; and it is said, on behalf of the respondents, that one of those securities, consisting of shares, might have been sold at some time during the administration for some substantial sum. That is the only case made in respect to these other securities. The appellant has not thought it necessary to deal specifically with that allegation of the respondents. No doubt, of course, if those securities have realized anything, if they are not now valueless, the appellant, on being allowed to come in and prove, must give a proper account of them, and either value them, or, if they are valueless, state that they are valueless, and offer to give them up; but the mere fact that the secured creditor, as mortgagee, might possibly have sold some shares ought not to be in itself alone fatal to him on this application. A mortgagee holding shares is not bound, as mortgagee, to be looking about for every turn of the market to see whether he can sell, nor is he bound to sell at the highest price the market can give. I can see no sufficient reason, in many a case, why a mortgagee of shares should not be acting prudently and rightly in not attempting to sell the shares, but in trying to realize moneys in respect of them by dividends or otherwise; and certainly I do not think a case is made against a mortgagee fatal to him in a case like the present by merely stating that he had as security some shares, and possibly might have sold them at a good price during the period which elapsed before he desired to prove.

I do not think, therefore, that on this part of the case the respondents have made a sufficient case to justify us in peremptorily refusing to allow the appellant to come in and prove.

That deals with practically the whole of what I may call the special circumstances in this case, which are said to render it unjust to allow the appellant to come in and prove now; and I have pointed out why I think there are no such circumstances as would enable us to say, on the merits, that he ought not to prove.

But now I come to a contention which, to a great extent, is a technical objection, and may be said to be almost the principal objection taken on behalf of the respondents.

It is said that this is not an administration in bankruptcy, and it is said that the applicants here are in a very much worse position, because it is an administration in the Chancery Division, and a certificate has been made.

To my mind, that is not in any way fatal to the appellant. Sect. 10 of the Judicature Act, 1875, undoubtedly applies to this case. I do not say that that has done away with the Chancery practice in an administration action, or that, for the purposes of the present case, we are to treat the bankruptcy practice as incorporated with or overruling the Chancery practice. Nothing of the kind; but s. 10, all the same, applies, and, so far as it is consistent with the Chancery practice, the Bankruptcy Rules apply, and ought to be applied; and, if this secured creditor in bankruptcy would have been allowed now to come in and prove, to my mind he ought to be allowed to come in in the Chancery administration, the estate being insolvent, unless there is some Chancery practice which prevents it.

Is there any Chancery practice which prevents it? Is it prevented by the certificate? Not so. I have pointed out, so far as the certificate is concerned, what its effect and meaning is, and what in particular the word "disallow" means in this certificate; and on the general question I wish to point out that, according to Chancery practice, a creditor, after a certificate has been made as to debts, and notwithstanding the certificate is, as a rule, allowed to come in when there are assets undistributed, and share in the administration of those assets, of course, in each case on such terms as to the Court seems just. There is no difficulty in the present case. In the first place, it appears to me that the certificate, having regard to what we now know to be the meaning of the word "disallow," need not even be varied. I think it would be quite sufficient to say that the creditor should be allowed to come in and prove, notwithstanding the certificate; but, even if it had been formally necessary here to vary the certificate, I should still have felt no difficulty, for, under Order LV., r. 71, I certainly am of opinion that there would have been special circumstances which would have justified and bound the Court, in justice, to have varied this certificate, of course taking care

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always to cause no injustice in the way I have previously referred to. That disposes of this case.

I need not go through the authorities. The only one I need say a word upon is *In re Hopkins*. (1) That case, to my mind, is clearly distinguishable, and does not apply to the present case. In *In re Hopkins* (1), under the Bankruptcy Act and Rules then applying, the creditor who, in that case, wished to come in and change his proof, could not have amended his proof in bankruptcy, and would not have been allowed to do so; and when he came and was obliged to confess that, in bankruptcy, he could not have been allowed to change his proof, he was met by the unanswerable objection in Chancery, "Where are your special circumstances? There is no special circumstance, and the Bankruptcy Rules"—as they then stood —"are against you"; and, accordingly, it was held that, not being allowed to change his proof in bankruptcy, and there being no special circumstances entitling the Court to allow him to vary the certificate, he could not alter his proof in Chancery. That is the whole case, and it is clearly no authority on the case now before us.

With regard to the application made to the master by the appellant, that occasioned some little difficulty in my mind at first; but, when I look at the peculiar circumstances of this case, I have also come to the conclusion that what then took place was a slip in practice, and that under the circumstances it ought not to be held fatal to the appellant. I think that what my Lord has pointed out is the proper course to be adopted, namely, to extend the time in which to appeal from the decision of the master in that case; to treat the present application as amended in that respect, and thus to give the Court necessary jurisdiction to make the proper order which I think ought to be made here.

The result will be that the appellant should be allowed, notwithstanding the certificate, to come in and prove. The terms with regard to detail will be mentioned in a moment.

STIRLING L.J. I have arrived at the same conclusion as my brethren, and after what they have said there is very little for

(1) 18 Ch. D. 370.

me to add. I should like, however, to say a few words on the point which was mainly urged before us yesterday, and which, as I read the judgment, was adopted by the learned judge as the ground of his decision in the Court below. The argument and the judgment, as I conceive, are rested upon Order LV., r. 70, which provides, reading it shortly, that every certificate shall be transmitted to the central office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons. A certificate has been made in the present case by which the claim of the present appellant was disallowed. It is said that that certificate is binding; and that is quite correct. It is binding; but what is the meaning of being binding? The contention is that it is binding in this sense, that the creditor is thereby precluded from again bringing forward the claim, notwithstanding any change in the circumstances which have occurred since that certificate was made. Now, undoubtedly the certificate might be a complete bar to the creditor. If, for example, the debt had been contested, and it had been adjudicated by the master at the time when he made his certificate either that the debt did not exist or that it had been satisfied, I conceive that that adjudication, not having been set aside within the proper time, would be a complete bar to the claim being brought forward. But it seems to me that we are entitled to go behind the certificate to this extent that we may ascertain the circumstances in which the disallowance took place.

Now, when that is done, it is clear upon the evidence that, the claim being originally made in answer to an advertisement issued under the direction of the Court, the appellant, when called upon to prove his debt, thought fit to withdraw the claim, relying, as he said, upon the securities he held. There was, therefore—and this indeed was not disputed at the bar—no adjudication whatever upon the debt itself. Res judicata could not be pleaded by any party to the proceedings. It seems to me that all that was meant by the certificate is this—that the claim was disallowed because in the circumstances existing at the date of the certificate the claim was inadmissible, the creditor electing to rely on his security. If,

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then, the circumstances have so altered that the creditor may legally bring forward the claim at the present time, it appears to me that the certificate ought not to prevent him from so doing; and, in my judgment, the case of *In re Metcalfe* (1) is an authority for that proposition. It does not in its circumstances govern the present case, but it is an authority to this effect—that, notwithstanding a certificate in which a claim is allowed at a certain amount, a further claim may be brought in without that certificate being varied. There a claim was made for a sum of 525*l.*, being principal 500*l.* and 25*l.* interest, and the certificate found that that was the amount due to the creditor. The creditor afterwards discovered from documents which came to his knowledge that the amount of interest which was allowed from the estate of the deceased was too small, and he applied to be allowed to prove for the additional interest which had not been allowed, and the Court of Appeal allowed the claim. James L.J., who gave the judgment of the Court, said that the case could not be distinguished from the ordinary case of a creditor coming in after a lapse of time, and he said that the interest in question had never been the subject of decision; that they were not reviewing any decision. It was merely a question of carrying in a claim for an amount which the applicant by mistake had omitted previously to claim.

It appears to me that the Court of Appeal there considered that the procedure which is authorized by rule 57 of Order LV. was applicable, and that upon a simple application by summons without any variation of the certificate a claim might be received if the judge was satisfied that it was just, but upon such terms and conditions as to costs and otherwise as the judge might think fit.

Now, the question whether in the present case the creditor ought to be admitted appears to me to depend upon the rules which prevail in bankruptcy at the present time, which are made applicable to administration actions in such a case as this by s. 10 of the Judicature Act of 1875.

With reference to that, it seems to me that the creditor would in bankruptcy be entitled to come in. He might come

(1) 13 Ch. D. 236.

in in two ways, either because he is a secured creditor who has realized his security, and, therefore, entitled to come in under rule 9 of the 2nd schedule of the Act, or it may be that he ought to be treated as a creditor who has valued his security as equal to the amount of his debt, and in that case the provisions of rule 13 of the same schedule would be applicable, and would enable him in the changed circumstances to come in and prove in bankruptcy.

It appears to me that the case of *In re Hopkins* (1) which was referred to cannot govern the present case, because in that case, as has already been pointed out, the rules which were in force in bankruptcy at the time when that case was decided were different from those which now exist, and precluded the creditor from bringing in any such claim as is now brought forward here.

I agree with what has been said by the other members of the Court on the various points which I do not think it necessary for me to enter into in detail, and on the whole I come to the conclusion that this appeal should be allowed on proper terms.

The following were the terms imposed by the Court:—

Leave to prove notwithstanding the certificate.

But the creditor is to comply with such orders as the judge may think fit with regard to the securities (if any) held by him other than the debentures and shares in the Delagoa Bay Railway Company, and the creditor is also to account on the footing of mortgagee in possession in respect of his dealings with all the securities.

And this order is not to delay any proceedings in the action so far as concerns the other creditors. But the applicant is to be at liberty in case of any contemplated distribution of assets before his claim is ascertained to apply for a sum being set apart to answer his claim to share in the distribution.

Applicant to pay costs of the proceedings by him other than the costs of appeal.

No costs of appeal.

Solicitors: *Hollams, Sons, Coward & Hawksley; Hurford & Taylor; Harston & Bennett.*

(1) 18 Ch. D. 370.

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[1902 P. 485.]

Tramway—Substantial Commencement of Works—Cesser of Powers—Evidence—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 18.

In s. 18 of the Tramways Act, 1870, which provides that the powers of promoters under a provisional order shall cease "if within one year from the date of the order the works are not substantially commenced," the term "works" means physical works actually executed.

A corporation, who had obtained a provisional order for the construction of electric tramways, had done no work within the year on the tramway itself, but had purchased land for offices and a generating station, and had entered into binding contracts for the supply of electric cars and for the supply and installation of dynamos and electric machinery:—

Held, by the Court of Appeal, that the works had not been substantially commenced within the meaning of the section.

Decision of Swinfen Eady J. reversed.

Sect. 18 also provides that "a notice, purporting to be published by the Board of Trade, in the *Gazette* to the effect . . . . that the work has not been substantially commenced . . . . shall be conclusive evidence for the purposes of this section of such . . . . non-commencement."

Held, by the Court of Appeal, that, in the absence of such a notice, other evidence of the non-commencement of the works was not excluded.

Decision of Kekewich J. in *In re Dudley and Kingswinford Tramways Co.*, (1893) 63 L. J. (Ch.) 108: 69 L. T. 711, disapproved.

THIS action was brought by the Attorney-General, at the relation of the Poole and District Electric Traction Company, Limited, and by the company as co-plaintiffs, against the mayor and corporation of Bournemouth, claiming an injunction to restrain the defendants from commencing or continuing to construct a tramway, authorized by a provisional order obtained by them, on the ground that they had not substantially commenced any part of the works or tramways authorized by the order within one year from the date thereof, as required by s. 18 of the Tramways Act, 1870.

The plaintiff company were the owners of and worked certain light railways in the neighbourhood of Bournemouth. By the Christchurch and Bournemouth Tramways Act, 1900,

which came into operation on August 6, 1900, the company were authorized to construct tramways from a point within the borough of Bournemouth to the town of Christchurch. This Act contained a provision that Tramway No. 2, therein described, situate within the borough of Bournemouth, should not be commenced until after August 1, 1902; and that if before that date the defendants should construct and complete the portion of the tramways authorized by the Bournemouth Corporation Tramways Order hereinafter mentioned, which were on the same lines as Tramway No. 2, together with such works as should be necessary to enable the company to exercise the running powers given them by the same order, the powers given to the company to construct Tramway No. 2 should cease and determine.

By the Bournemouth Corporation Tramways Order, 1900, confirmed by the Tramways Order (No. 5) Act, 1900, which came into operation on the same day as the company's Act, the defendant corporation were authorized to construct, among others, a tramway upon the same lines as the company's Tramway No. 2, and the order contained provisions giving the company running powers over the tramway so constructed.

The defendants' order incorporated the Tramways Act, 1870, but prescribed no time within which the work should be substantially commenced. The question in this action, therefore, depended on the construction of s. 18 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), which requires the work to be substantially commenced within a year. (1) No order prolonging

(1) Sect. 18: "If the promoters, empowered by any provisional order under this Act to make a tramway, do not, within two years from the date of the same, or within any shorter period prescribed therein, complete the tramway and open it for public traffic; or, If within one year from the date of the provisional order, or within such shorter time as is prescribed in the same, the works are not substantially commenced; or, If the works having been commenced are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension; the powers given by the provisional order to the promoters for constructing such tramway, executing such works, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the same as is then completed, unless the time be prolonged by the special direction of the Board of Trade, and as to so much of the same as is then completed the Board of Trade may

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the time for the commencement of the works had been made by the Board of Trade.

The action was commenced on March 8, 1902.

The corporation in their defence alleged that they had substantially commenced the works, and they delivered particulars, which were admitted by the plaintiffs, shewing that the following things had been done before August 6, 1901. The corporation had adopted a scheme, prepared under their orders by their own engineers, for the construction of the tramways, and had negotiated for and completed the purchase of land for the erection of offices, a generating station, and other works. They had laid plans and estimates before the Board of Trade, and had applied for and obtained the sanction of the Board of Trade to their raising a loan of 174,000*l.* for the purpose of constructing the tramways. They had also entered into binding contracts with the British Westinghouse Company for the supply of electric cars at a price of 28,020*l.*, and with the British Thomson Houston Company for the supply, fixing, and installation of dynamos and electric machinery for working the tramways. These contracts provided that the work must be commenced immediately. No evidence was given on either side except the particulars and the contracts.

The action came on for hearing before Swinfen Eady J. on June 13, 1902.

Warmington, K.C., and *R. J. Parker*, for the Attorney-General and the co-plaintiffs. The only question is, whether

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allow the said powers to continue and to be exercised if they shall think fit, but failing such permission the same shall cease to be exercised, and where such permission is withheld then so much of the said tramway as is then completed shall be deemed to be a tramway to which all the provisions of this Act relating to the discontinuance of tramways after proof of such discontinuance shall apply, and may be dealt with accordingly.

"A notice purporting to be published by the Board of Trade in the London or Edinburgh *Gazette*, accordingly as the district to which it relates is situate in England or Scotland, to the effect that a tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, shall be conclusive evidence for the purposes of this section of such non-completion, non-commencement, or suspension."

the corporation had within one year from the date of their provisional order substantially commenced their works. If they had not, their powers have ceased by reason of s. 18 of the Tramways Act, 1870. There is no definition of "works" in the Tramways Act, but Sched. B to that Act requires plans to be deposited of "proposed works"; and the rules under the Tramways Act require plans to be deposited of the tramway only. This shews the meaning of works in s. 18. It is confined to works done to, or integrally part of, the tramway shewn on the deposited plans. It is only these works which interfere with the rights of the public. Sect. 18 is borrowed from the Railway Acts, and it is inserted in pursuance of standing orders and for the protection of the public, or third persons whose rights are interfered with by the construction of the works. Ancillary works such as generating stations are never put on the deposited plans, and they can be constructed at any time.

In Part II. of the Act, which relates to the construction of tramways, the words "the works" or "the work" occur frequently; but the context shews that in every case the words refer to work done in the actual construction of the tramway, or in breaking up the road and preparing for the tramway. We submit that the term "the works" in s. 18 is to be construed in the same way.

Nothing whatever has been done to the tramway or to the roads in preparation for it. Even if we are wrong upon the construction of the phrase "the works," the words "substantially commenced" must mean the commencement of some actual physical work. They cannot mean merely contract for work, and that is all that has been done here.

Vernon Smith, K.C., and *Charles Church*, for the defendants. The only admissible evidence that there is no substantial commencement of the works of a tramway is a notice by the Board of Trade, which is made conclusive evidence by the latter part of s. 18 of the Tramways Act. It was decided by Kekewich J. in *In re Dudley and Kingswinford Tramways Co.* (1) that this notice was the only proper evidence. That was a question of abandonment, but it was under the same section.

(1) 63 L. J. (Ch.) 108; 69 L. T. 711.

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The whole scheme of the Act is to make the Board of Trade the authority to decide in all questions as to the action of a company under the Act. The Board can declare that the working of the tramway has been discontinued (s. 41), or that the company is insolvent. The Board is the sole authority to grant a provisional order (s. 8) to authorize a lease of the tramway (s. 19), or a loan for its construction (s. 20), and they have power to settle disputes between a company and the local authority. By s. 18 itself the Board is made the judge on the questions of extension of time, and the exercise of the powers given by the Act over such part of the tramways as is completed. We submit that the Board was intended to decide upon all questions under the section. There can be no other reason for inserting the provision that a notice by the Board is to be conclusive evidence. If the Court hears other evidence and comes to the conclusion that the works have been substantially commenced, the Board might afterwards issue a notice that they have not.

But, if the Court does look at the evidence, there is no reason for limiting the meaning of "the works" in s. 18 to works shewn in the deposited plans. The natural meaning is, the works authorized by the provisional order. The order authorizes the erection of generating stations, &c., and similar works which are absolutely necessary for the working of the tramways. The corporation is not bound to do the work itself; a substantial commencement has been made by entering into binding contracts which compel the contractors to commence work at once.

There is no definition of "works" in the Tramways Act, 1870; but s. 15 incorporates the Lands Clauses Act with every provisional order, and directs that for the purposes of such incorporation a provisional order shall be deemed to be the special Act. Sect. 2 of the Lands Clauses Act provides that "the expression 'the works' or 'the undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed."

Warmington, K.C., in reply. A provision in an Act of Parliament that certain evidence is to be conclusive does not

make it exclusive of all other evidence. That has been decided under the Debtors Act—*Reg.* v. *Thomas* (1)—and it is familiar practice under the Parliamentary Deposits Act of 1846 (9 & 10 Vict. c. 20) that the Queen's printer's copy is accepted as evidence that an Act has been passed, though s. 5 of the Act provides that no order shall be made except upon the certificate of the Chairman of Committees in the House of Lords or of the Speaker: *In re Yarmouth and Ventnor Ry. Co.* (2)

SWINFEN EADY J. (after stating the facts as above). The question raised by this action is whether the defendants did substantially commence the works within the period of one year from August 6, 1900. It has not been disputed that if the defendants had not substantially commenced their works their powers expired on that date.

It is said on behalf of the defendants, in the first place, that the only proper evidence under the statute that they have failed to commence their works within the period of twelve months is a notice published in the *Gazette*, and that that notice has not been published. Then, if they are wrong in that, the defendants say that in any case they did, in fact, substantially commence their works within the period of a year.

It has been decided by Kekewich J. in *In re Dudley and Kingswinford Tramways Co.* (3) that, upon proceedings in respect of the abandonment of a tramway, the only evidence which the Court could receive was the notice published in the *Gazette* by the Board of Trade. In opposition to that, counsel for the plaintiffs cited two authorities, which were not cited before Kekewich J., with a view of shewing that conclusive evidence, the expression contained in the statute, does not mean exclusive, and that, although that evidence is conclusive, it does not prevent the parties from adducing other evidence upon the point. If the decision of this case depended upon that point, I should follow (without expressing any opinion of my own) the decision of Kekewich J. as that

(1) (1870) 22 L. T. 138. (2) W. N. (1871) 236.
(3) 63 L. J. (Ch.) 108; 69 L. T. 711.

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of a judge of co-ordinate jurisdiction having determined the precise point, leaving it to another Court to review that decision. But in my judgment that question does not arise, because I have come to a conclusion adverse to the plaintiffs and relators on the other part of the case. The conclusion I have come to is that the works were substantially commenced within a year within the meaning of s. 18. [His Lordship read shortly the powers given by the provisional order, and proceeded:—]

In other words, full power is given to the defendant corporation to construct and maintain their tramways, and to use them as electrical tramways, and to generate the necessary current, and to construct and maintain all works necessary for those purposes.

Those being the terms of the order, I have to consider the precise meaning of the words "the works" as used in s. 18 of the Tramways Act, 1870. Now it will be observed that the section provides for three events. The first is: "If the promoters, empowered by any provisional order under this Act to make a tramway, do not, within two years from the date of the same . . . . complete the tramway and open it for traffic." The next alternative is: "Or if within one year from the date of the provisional order . . . . the works are not substantially commenced"—not the tramway, but the works. The third alternative is: "If the works having been commenced are suspended without a reason sufficient in the opinion of the Board to warrant such suspension."

The first expression, "the tramway," which is to be completed and opened for public traffic, must mean the tramway authorized by the provisional order. The argument on the second branch of the section has been this: "the works" means the works relating to the construction and laying down of the tramway itself, that is to say, the works incidental to putting the tram lines upon the road over which the tramway is to run. It is said that that construction is assisted by the fact that the statute requires plans of the intended works to be deposited, and that the only deposited plans upon which works are shewn are those of the intended tramway itself;

there is nothing that requires the promoters to deposit plans of any generating station, or other necessary or incidental works. It is quite true that the promoters of the undertaking have to deposit plans and sections shewing the intended tramways; but I am of opinion that it would be too narrow a construction of this section to limit the expression "the works" to these works. No doubt they form part of "the works" referred to in the statute; but I think the expression "the works" in s. 18 means the whole of the works which by the order the promoters are authorized to execute. The expression "the works" is defined in s. 2 of the Lands Clauses Act, which is incorporated in the provisional order: "'The works' . . . . shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed." I am of opinion that the expression "the works" in s. 18 of the Tramways Act has the same meaning, and means the whole of the works which by the provisional order, which is equivalent to the special Act, the corporation were authorized to execute.

A question which I have still to consider is whether, attributing that meaning to the expression "the works," the defendants did substantially commence the works within a year from August 6, 1900.

[His Lordship read the particulars delivered by the defendants as to the purchase of land and the contracts with the British Westinghouse Company and the British Thomson Houston Company, and proceeded:—]

The contracts were made in writing, each contract being manifestly a substantial contract, the contractors being under penalties for the due performance of the contract, and the contract in each case providing that the works comprised therein shall be commenced immediately; and the Thomson Houston contract provides not only for the supply of dynamos, but for the fixing and installation in Bournemouth of all the electrical and other machinery referred to in the specifications.

So that it comes to this, that within the year the corporation entered into contracts with responsible contractors for the carrying out of a substantial portion of the work authorized by

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the provisional order, and the contract provided for the works being commenced at once; and it has not been suggested that the contractors have failed to comply with this provision of their contract.

Under these circumstances I am of opinion that the defendants did, within the period of a year from the passing of the Act, commence the works by the provisional order authorized. In my judgment, it would be far too narrow a construction to limit "the works" in s. 18 to the actual laying of the tramway lines. It may well be that it would be proper to postpone the actual interference with the streets for the purpose of laying the tramway until as late a period as possible, so that there might be less disturbance of the highway, and as little inconvenience to the public as possible, and that it would not be wise or prudent, if the tramway could actually be laid within six months, to lay it within the first six or twelve months while still another year would be required to put up the generating plant and machinery which would be necessary before the line could be opened for public traffic. However that may be, the conclusion of fact which I have come to is that the defendants have within the period of a year substantially commenced their works within the meaning of s. 18 of the Tramways Act, 1870.

I have not forgotten the argument addressed to me by counsel for the plaintiffs, that Part II. of the Act of 1870 shews the sense in which the expression "the works" is used. No doubt the expressions "the work" or "the works" are in various sections very often used with reference to works connected with the tramway itself, but that does not in my judgment in any way narrow the meaning in which the expression "the works" is used in s. 18. The plaintiffs' action fails, and must be dismissed with costs. Under the Public Authorities Protection Act, 1893, the costs must be as between solicitor and client.

J. R. B.

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From this decision the plaintiffs appealed. The appeal came on for hearing on July 14, 1902.

Warmington, K.C., and *R. J. Parker*, for the plaintiffs.
Vernon Smith, K.C., and *Charles Church*, for the corporation.
R. J. Parker, in reply.

The arguments adduced in the Court below were repeated, and the same cases were cited. As to the meaning of the expression "conclusive evidence," *In re National Debenture and Assets Corporation* (1) was also referred to.

VAUGHAN WILLIAMS L.J. I am very sorry that I am obliged to deliver the judgment I am about to deliver, and if I could have seen my way to avoid doing so it would have afforded me great satisfaction, because I do not think that the result of my judgment will really accord with the substantial merits of the case.

The object of this action is to restrain the Bournemouth Corporation from commencing or continuing to construct the tramways authorized by their provisional order, or, alternatively, that portion thereof which will be situate between the commencement of Tramway No. 2, authorized by the defendant company's Act, and the point where the last-mentioned tramway crosses the boundary (as it existed at the time of the passing of the company's Act) of the borough of Bournemouth.

The action is based upon s. 18 of the Tramways Act, 1870. [His Lordship read the section, and continued:—]

It is said that the works in question, which were authorized by the provisional order, since confirmed by an Act of Parliament, have not been "substantially commenced" within one year from the date of the order; that no prolongation of time or certificate of commencement has been obtained from the Board of Trade, and that in this state of things it is ultra vires for the corporation to commence or continue the works so authorized, and that therefore an injunction ought to be granted.

Now, the first answer which is given on behalf of the defendants is this. It is said that the only way of proving that any of those events which are mentioned in s. 18 has

(1) [1891] 2 Ch. 505.

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happened is by the production of a notice purporting to be published by the Board of Trade in the *Gazette* to the effect that a tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, that notice being by s. 18 made "conclusive evidence for the purposes of this section of such non-completion, non-commencement, or suspension." It is said that the words "shall be conclusive evidence" mean "shall be the only evidence." I cannot agree in that conclusion. Swinfen Eady J. did not give any judgment based upon his own reasoning upon this point, but he said that if necessary he should follow the decision of Kekewich J. in *In re Dudley and Kingswinford Tramways Co.* (1), that upon proceedings in respect of the abandonment of a tramway the only evidence which the Court could accept was a notice published in the *Gazette* by the Board of Trade. But the learned judge said that he had come to a conclusion adverse to the plaintiffs on the other part of the case, namely, that the works were "substantially commenced" within a year as required by s. 18. It is, however, necessary that in this Court we should determine the first question, and, in my opinion, it would not be right to read the words "conclusive evidence" as if they were "exclusive or the only evidence." The ground upon which the argument is based is this. It is said that, if you look at the alternatives mentioned in s. 18, you will find that the body appointed to determine whether any one of those three alternatives has occurred is the Board of Trade, and that under those circumstances the meaning of the provision that a notice published by the Board of Trade shall be conclusive evidence is that it shall be the only evidence. That might perhaps have been so if the major premise were true—that is, if it were true that the Board of Trade is the body appointed to determine whether any of the three alternatives mentioned in s. 18 has occurred. But that is not so. It is true that as regards the third alternative the Board of Trade is the body appointed to determine whether it has happened: "If the works having been commenced are

(1) 63 L. J. (Ch.) 108; 69 L. T. 711.

suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension." It may be said, perhaps, that in that case the Board of Trade has the duty cast upon it of deciding whether the works have been suspended without sufficient reason; but as to the other two alternatives there is no such provision, and the very fact that the Board of Trade is mentioned in the third alternative goes to shew that it is not the body which is exclusively to determine the other matters. Under these circumstances, I am of opinion that the decision of Kekewich J. in *In re Dudley and Kingswinford Tramways Co.* (1) cannot be supported.

That being so, it becomes necessary to deal with the other point, namely, the question whether "the works" were in fact "substantially commenced" within a year within the meaning of s. 18. Swinfen Eady J. has held that they were substantially commenced. He arrived at that conclusion by a consideration of what is the precise meaning of the word "works" as used in the Act, and he came to the conclusion that the term "the works" is used in such a sense as to include, not only physical works actually executed, but also the taking of any substantial step towards the carrying out of a contract, and he included as a "substantial" step the giving of an order for the execution of certain parts of the works, and also the purchase of some land which was bought for the purpose of erecting a generating station. I cannot agree with this conclusion. In my judgment, the "substantial commencement" of the works means the execution of physical works. In this case no evidence has been given, but the defendants have given particulars of what they say is the substantial commencement of the tramways and works; and in those particulars there are mentioned a contract of April 18, 1901, with the corporation for the supply of dynamos, plant, &c., and a contract of May 10, 1901, with the corporation for the supply of electric cars for the tramways. It is admitted that no works had been actually executed, and that nothing had actually been done as part of the works of the tramways before the expiration of a year from the date of the confirming

(1) 63 L. J. (Ch.) 108; 69 L. T. 711.

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Act. But it is said that the giving of the orders by these two contracts constituted a "commencement" of the works. I cannot say that that is so. The giving of an order is after all only an attempt to get something done by some one else instead of doing it yourself; and it appears to me that the giving of an order cannot be said to be more than evidence of an intention to execute the works, and that it cannot be said to be a substantial commencement of the works. Under these circumstances, it seems to me that the second alternative mentioned in s. 18 has come into operation, and that from the end of the year the powers given to the corporation by the provisional order ceased to exist, except as to so much of the works as was then completed (and there was none in this case), "unless the time be prolonged by the special direction of the Board of Trade." There has been no prolongation of the time for the substantial commencement of the works. An application has been made since the action to the Board of Trade to extend the time for completion; but that is another matter. That application was based upon the hypothesis that the time for commencement had been observed. The decision of Swinfen Eady J. was given before the application to the Board of Trade, and as to Tramway No. 6 they gave leave for prolongation without prejudice to the pending litigation. But, if the judgment of Swinfen Eady J. cannot be supported, as I think it cannot, that order of the Board of Trade will go for nothing.

Under these circumstances, I am sorry to say, I can see nothing for us to do but to reverse the decision of Swinfen Eady J., upon the ground that upon the evidence it is plain that there has been no substantial commencement of the works within the specified time. I should have been glad if I could have seen some way by which the Board of Trade could remedy this slip (I think it is a mere slip) by which the corporation may be prevented from carrying out the necessary works after they have spent, or rendered themselves liable to spend, a considerable sum of money in respect of the contracts into which they have already entered. But I cannot see any way in which the Board of Trade can prevent this unfortunate result.

The appeal must be allowed with costs, and an injunction must be granted.

ROMER L.J. I am of the same opinion. It is said, and it is probably the case, that if this appeal succeeds, as in my opinion it ought, great hardship will be inflicted upon the defendants. But this Court cannot allow considerations of that kind to affect its judgment on the true construction of the statutes which we have to consider, and, indeed, it should be borne in mind that the provisions in question ought, in the interests of the public, when fairly and properly construed, to be strictly enforced, even though their enforcement may result in individual hardship.

Now, the only question which arises is, whether the defendants have under their provisional order "substantially commenced" the works of the tramway within one year from the date of that order, within the meaning of s. 18 of the Tramways Act, 1870. Now the defendants take two points. The first point is this. Sect. 18 provides for the cesser of the promoters' powers in three events, and, with regard to each of those three events, s. 18 provides that a notice purporting to be published by the Board of Trade in the *Gazette* shall be conclusive evidence for the purposes of the section of the happening of the event.

It is said on behalf of the corporation that, having regard to the construction of the Act taken as a whole, this provision means that that notice in the *Gazette* is to be the only evidence at which the Court can look; in other words, that for determining whether the powers of the promoters have ceased under the section, the opinion or decision of the Board of Trade is alone to be regarded, and inferentially that there is no jurisdiction in the High Court to consider the question apart from the determination of the Board of Trade. In my opinion, that is not the right construction of that provision. If the Legislature had intended so to provide, it could have done so in clear and simple language. It certainly has not done that. There is nothing in the Act which expressly provides that the Board of Trade shall determine the question whether there has

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been a substantial commencement of the works, or the question whether the tramway has been completed and opened for public traffic, beyond what I shall presently mention with regard to the second point. And, in the absence of any express provision giving such a power to the Board of Trade, you can only infer it if the rest of the Act renders the inference necessary. In my opinion, there is no such necessary inference. Certainly you cannot infer it from the fact that in other parts of the Act you do find special matters confided or entrusted to the decision of the Board of Trade alone. On the contrary, I think that, when you find some express provisions of that kind in the Act, the natural inference would be that, when in other clauses of the Act those express provisions are not contained, it was not intended that the decision of the Board of Trade should be final. But I think that in the present case there are other considerations which shew that such an inference as is suggested on behalf of the defendants cannot be drawn. The argument on behalf of the defendants comes in substance to this—that in the first two cases which are dealt with by s. 18 you ought to imply the words "in the opinion of the Board of Trade."

Now, as a matter of fact, when s. 18 deals with the third case, namely, a suspension of the works, there is an express provision that the suspension must be "without a reason sufficient in the opinion of the Board of Trade to warrant such suspension," an express provision following immediately after the first two cases which contain no such provision. I think the inference is almost inevitable that in the first two cases the Legislature did not intend to cover them by an implied insertion of the words "in the opinion of the Board of Trade." It appears to me that the first two alternatives in s. 18 are contrasted with the third.

And there is another consideration which points in the same direction. The first alternative refers to the completion of the tramway, and the section says that the powers of the promoters are to cease "if the promoters do not within two years complete the tramway and open it for public traffic." Now, in the defendants' provisional order (1) there is the following

(1) Vide schedule to 63 & 64 Vict. c. ccviii.

express provision (clause 18): "The tramways shall not be opened for public traffic until the same have been inspected and certified to be fit for such traffic by the Board of Trade." That commits to the Board of Trade the duty of certifying that the tramways are fit for public traffic; and no doubt when that certificate is given it is final, and then the tramways may be opened. But the mere obtaining of that certificate will not enable the promoters to escape from the operation of the first alternative in s. 18; for not only must they complete the tramways, not only must the tramways be fit for public traffic, but they must, within the words of s. 18, be in fact open for public traffic within the two years. So that, though the promoters had obtained the certificate of the Board of Trade, if they delayed the opening of the tramway for public traffic they might still find that their powers had ceased at the end of the two years. Clearly, under these circumstances, you cannot infer that the Legislature has provided that the simple question of fact, whether the tramway has been opened for public traffic, shall be committed to the determination of the Board of Trade.

For these reasons I think that the first point taken on behalf of the defendants must be decided adversely to them.

I pass now to their second point—namely, that they have complied with the provisions of s. 18, and that the works referred to in s. 18 have been "substantially commenced" within the year. It is to be observed that the provision as to the works being "substantially commenced" follows immediately after the provisions as to the tramway being completed and opened for public traffic, and is another provision in the interest of the public to prevent delay on the part of the promoters in getting the tramway opened for public traffic. Moreover, I think light is thrown on the meaning of the word "works" in that clause by the latter part of s. 18, that in the three cases indicated "the powers given by the provisional order to the promoters for constructing such tramway, executing such works" (and clearly to my mind those words refer to the works mentioned as being substantially commenced in the prior sentence), "or otherwise in relation thereto, shall cease

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to be exercised, except as to so much of the same" (that is, of the works or the tramway) "as is then completed." It appears to me, therefore, that in this section the words "works substantially commenced," referred to subsequently as "works executed," have their ordinary meaning, and point to some physical act done by the promoters, or by their contractors, agents, or servants. I think that is further indicated by the definition in clause 3 of the defendants' provisional order—namely, "the expressions 'the tramways' and 'the undertaking' shall mean respectively the tramways and works and the undertaking by this order authorized." The word "respectively" shews, in my view, that the word "tramways" goes with the word "works." Further, if it be the fact (and I need not decide whether it is or not) that, for the purpose of construing s. 18 of the Act of 1870, you ought to have regard to the definition in s. 2 of the Lands Clauses Consolidation Act, 1845, what does that say? That definition is as follows: "The expression 'the works' or 'the undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed." I note the words "to be executed." All these considerations point, in my opinion, to the conclusion that the words "works substantially commenced" in s. 18 are used in their popular or, I might say, in their natural sense, and they mean works and nothing but works. Now what is it that the defendants say has been done by them by way of substantial commencement of the works? They appear to have bought some leasehold land, but they have not erected any buildings or commenced any work upon it. Can it be said that the mere purchase of vacant land, without erecting or commencing to erect any building or doing any work upon the land, is, within the words of s. 18, a "substantial commencement of the works"? In my opinion it cannot. What else is there which the defendants have done? There are only the two contracts which have been relied upon. What are those contracts? In substance they are, so far as I can see, contracts for the delivery of chattels. But I will assume that they are contracts for the construction of something which may properly be called

"works." Was anything done under those contracts within the time limited by s. 18? Nothing. Neither the contractors nor their servants nor the corporation nor their servants did anything. The contracts were made, and nothing more was done. How can the corporation say that they have substantially commenced works merely because their contractors have contracted to do works, when those contractors have not in fact done or commenced to do any works whatever under the contracts? In my opinion that cannot be said. The corporation did not even, as they might have done, give a written order to the contractors to commence the works; but, as I have said, the contracts were contracts and nothing more, and no works whatever were commenced under them. There is nothing else on which the defendants can rely as shewing that they have "substantially commenced" the works.

In my opinion that contention wholly fails, and it follows that this appeal must succeed. I so far appreciate the hard position of the defendants that I should have been personally glad if I could have seen any way by which, by application to the Board of Trade or otherwise, the defendants might have been enabled to remedy that which may well have been a slip on their part. But it has been admitted (and I agree that the admission must be made) that there is no existing power in the Board of Trade or any other body, as far as I can see (unless it be an Act of Parliament), which can put this matter straight. That being so, however hard it may be upon the defendants, it seems to me that it is the plain duty of this Court to allow the appeal, and to grant the injunction which has been asked for.

STIRLING L.J. I am of the same opinion, and I have very little to add.

The question is, whether the defendants have lost their power of making the tramways and executing the works authorized by their provisional order by reason of the provisions of s. 18 of the Tramways Act, 1870, which is incorporated with the order. It is contended that the defendants have lost those powers because the works have not been "substantially commenced" within one year from the date of the provisional

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order. [His Lordship read the provision at the end of s. 18 as to the notice purporting to be published by the Board of Trade being conclusive evidence, and continued:—]

It is said that, having regard to this provision and to the general scope of the Act with reference to the position of the Board of Trade in relation to tramways, the only proper evidence of the works not having been substantially commenced is a notice published in the *Gazette* by the Board of Trade.

Now, the provision is that such a notice is to be "conclusive" evidence. But that is not the same thing as saying that the notice is to be the exclusive evidence of the fact, and I can find nothing in the other provisions of the Act which would justify the Court in inferring that such was the intention of the Legislature—that it was intended to entrust the Board of Trade and no one else with the power of determining whether any of the three events which are referred to in the section had or had not happened. As regards the third event—namely, the suspension of the works without a sufficient reason—the opinion of the Board of Trade is expressly referred to, and it may be that in that case a notice published by the Board of Trade is the only means of ascertaining whether the event has happened. But I can find nothing of that kind as regards the other two events.

I come then to the question whether on the evidence it ought to be held that the works were not substantially commenced within the year. Now, with reference to the word "works," I think a distinction is drawn in s. 18 itself between the construction of the tramways and the execution of the works, and, as regards the meaning to be given to the word "works," the learned judge in the Court below himself put a wide construction to the word. He said he thought the expression "the works" in s. 18 "means the whole of the works which by the order the promoters are authorized to execute." I am not prepared to differ from that interpretation of the word "works," and in particular, as at present advised, I do not agree with Mr. Warmington's argument with reference to clause 6 of the provisional order, which authorizes the promoters to do two sets of things: "(*a*) To construct and main-

tain . . . . the tramways hereinafter described with all proper rails, points . . . . works and conveniences connected therewith or for the purposes thereof"; and "(*b*) Erect or construct on any lands acquired or appropriated for the purposes of the undertaking any offices, sheds, ... or other buildings, yards, works and conveniences for the purposes of the undertaking."

It was contended on behalf of the plaintiffs that the word "works" ought to be limited to those which are specified in sub-clause (*a*). I am not persuaded that that is the true construction, and for the present purpose I will assume that the "works" which are referred to in s. 18 of the Act (which is incorporated in the order) extend to those mentioned in sub-clause (*b*) as well as to those mentioned in sub-clause (*a*). But still I think that the true interpretation of s. 18 is that some substantial portion of the works authorized by the order must have been physically commenced by the promoters.

In the present case we find that nothing at all has been done physically; there has been nothing except preparation for doing something physically. There have been negotiations and plans and estimates have been prepared and advertisements issued, and there are tenders and contracts, and the purchase of a leasehold interest; there is nothing beyond. I cannot think that works can be said to have been "substantially commenced" when all that has been done is that contracts for their execution have been entered into by, no doubt, substantial contractors, but no part of the works has been executed by the contractors within the prescribed time. Neither can I think that the mere purchase of a piece of land, with the object of erecting or constructing on it buildings and works for the purposes of the Act, that is, the acquisition or appropriation of the land without anything being done upon it, satisfies the requirements of s. 18.

In this state of things I agree that the plaintiffs have made out their allegation, namely, that the works have not been substantially commenced within the prescribed period of a year.

Now, the Board of Trade certainly have the power of extending the time either for the commencement or for the

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completion of the works, and, if it had been possible that an effective application could now have been made to the Board of Trade for the exercise of that power, I should have said that anything done by this Court ought in no way to prejudice such an application. But the rules which have been made by the Board of Trade under the Act of 1870, and which by the terms of that Act have the force of an Act of Parliament, have prescribed times for applications, first, for extending the time for the commencement of the works, and, secondly, for extending the time for the completion of the works; and we find that in this case the time for applying for an extension of the time for the commencement of the works has passed by without any application having been made. Therefore, it seems to me that, so long as that rule remains unrepealed, no effective application can in the present case be made to the Board of Trade.

The result, therefore, is that the injunction asked for must be granted, and the appeal must be allowed with costs.

Solicitors: *Sydney Morse; Lovell, Son & Pitfield, for J. & W. H. Druitt, Bournemouth.*

W. L. C.

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[1900 B. 5369.]

Partnership Articles—Power for any Partner to nominate Successor—Nomination—Acceptance by Nominee—Consent or Refusal by continuing Partners—Rights of Nominee—Specific Performance—Equitable Relief.

Where, in partnership articles, it has been agreed between the partners that any one of them shall be at liberty to nominate and introduce any other person into the partnership, and a valid nomination is made by one partner accordingly, followed by acceptance of the nomination by the nominee, the other partners are bound to give effect to the nomination, and, in case of their refusal to admit the nominee as partner or to do and execute the acts and deeds necessary for conferring upon him the rights of a partner, he is entitled, as against them, to such relief as Courts of Equity are in the habit of granting to persons standing in the relation of partners, subject to his fulfilling, on his part, such conditions of his admission as may be contained in the articles, such as executing a proper deed, or otherwise.

Lovegrove v. *Nelson*, (1834) 3 My. & K. 1, 20; 41 R. R. 1, 2, *Page* v. *Cox*, (1851) 10 Hare, 163, and Lindley on Partnership, 6th ed. p. 368, considered.

By articles of partnership dated September 19, 1892, and made between Henry Byrne, hay salesman, on the one hand, and three persons, named Reid, Chalkley, and Moore, who had been for several years clerks and salesmen in his employ, on the other hand, after reciting that Byrne had agreed to admit those three persons into partnership with him upon the terms thereinafter expressed, and that part of the arrangement was that the leasehold premises upon which Byrne had been carrying on business should remain his property, and that he should grant a lease of the same for fourteen years to the firm intended to be thereby constituted, at the annual rent of 425*l.*: it was witnessed that the several parties agreed to become partners in the trade or business of hay salesmen upon the terms expressed in the articles following. The articles provided that the partnership should continue for the term of fourteen years from January 1, 1892, and should be carried on under the firm of Turner, Byrne & Co., and upon the said leasehold premises; that each partner should be credited with

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the amount of stated capital brought or to be brought in by him; that the net profits of the business should belong, as to nine-twelfths to Byrne, and as to the remaining three-twelfths to Reid, Chalkley, and Moore respectively; and that Byrne should be the managing partner.

Art. 29 was as follows: "Subject to the proviso written at the end of this clause, the said Henry Byrne may at any time during the said term nominate, either by will or otherwise, and introduce into the firm for the whole or any part of his share in the said business and the profits thereof any son or sons upon attaining twenty-one years of age, or any other male person or persons over twenty-one years of age, he may think fit; and in such case the son or sons, or other male person or persons, to be so nominated and introduced shall thenceforth, during the residue of the said term, carry on the said business in partnership with the incoming partners, or such of them as shall then remain in the firm, for the residue of the said term upon and subject to the like terms, conditions and stipulations as are herein contained with reference to the incoming partners; and upon such introduction such son or sons, or other male person or persons, shall execute a proper deed or deeds binding himself and themselves to observe the said terms and conditions accordingly. . . . Provided that, in the event of the said Henry Byrne introducing as a partner any person in the employ of the firm (whether a son of the said Henry Byrne or not), such introduced partner shall, as between himself and the incoming partners, continue to receive the salary which he may be in receipt of at the date of such introduction, or such other sum as the said Henry Byrne shall determine, but not exceeding the amount which the incoming partners may at that time be receiving." The articles concluded with an agreement for reference of all disputes to arbitration.

The partners proceeded to carry on the business under the articles, and in course of time Stanley Byrne, a son of Henry Byrne, was taken into the employment of the firm at a salary. On February 9, 1898, Stanley Byrne having then attained twenty-one, his father addressed a notice to his partners of which the material part was as follows: "In accordance with

the articles of partnership I hereby nominate my son Stanley to one-twelfth of the profits of the business carried on." On February 12, 1898, Stanley Byrne accepted the nomination, and offered to bring in capital, demanding that any payments he should receive in future should be treated as payments on account of profits and not as salary as theretofore; but Reid, Chalkley, and Moore refused to consent to his being admitted as a partner, although no personal unfitness was alleged against him.

Questions having arisen as to whether the nomination was valid, and as to other matters, the writ in the present action was issued in December, 1900, by Henry Byrne against Reid, Chalkley, and Moore, Stanley Byrne being made a co-defendant, claiming—(1.) a declaration that the defendant, Stanley Byrne, was, under the partnership deed, duly nominated and introduced into the firm for one-twelfth share; (2.) a declaration that the plaintiff was not bound to do or execute to or in favour of the defendants Reid, Chalkley, and Moore (to the exclusion of the defendant Stanley Byrne) any acts, deeds, or things necessary or proper for vesting the share of the plaintiff or for enabling the outstanding credits or effects of the firm to be got in; (3.) to have the affairs of the firm wound up upon the terms of the said deed, having regard to the aforesaid declaration; (4.) accounts and inquiries; and (5.) the appointment of a receiver and manager.

On March 29, 1901, upon a motion by the defendants Reid, Chalkley, and Moore to stay proceedings, and upon a motion by the plaintiff for a receiver, an order was made by consent directing that the following questions of fact should be set down for decision before Joyce J., namely, whether the defendant Stanley Byrne had been duly nominated and introduced as a partner in the firm, and upon what conditions; and further whether, by reason of anything that had happened since February 12, 1898, the defendant Stanley Byrne had abandoned his position as a partner, or his right to become a partner: all other questions arising in the action being referred to an arbitrator therein named; and the defendants, other than Stanley Byrne, by their counsel undertook to execute

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all such deeds and instruments with reference to the introduction into the business of the defendant Stanley Byrne as a partner as might be agreed on between the parties or, in case of difference, might be found by the arbitrator to be necessary to give effect to any final judicial decision on the question to be decided by the judge.

The questions of fact specified in that order were tried before Joyce J. in June and July, 1901, with the result that on July 13, 1901, his Lordship gave judgment, finding and declaring that the nomination of Stanley Byrne was a valid nomination by the plaintiff under clause 29 of the partnership articles to one of the plaintiff's twelfth shares in the partnership business and the profits thereof, as from the date of such nomination; and that the plaintiff had introduced or was entitled to introduce the defendant Stanley Byrne into the firm accordingly; and that the defendant Stanley Byrne had not abandoned his right to become a partner, although, in the events which had happened, especially by reason of the refusal of Reid, Chalkley, and Moore to accept him as partner, he never actually became a partner in the firm; and that the plaintiff and the defendant Stanley Byrne were, therefore, not entitled to have the nomination enforced by a judgment or order for specific performance; but this last declaration was made without prejudice to such other rights or claims (if any) as the plaintiff and the defendant Stanley Byrne, or either of them, might be entitled to by virtue or in consequence of such nomination, or under or by virtue of the order of March 29, 1901, or otherwise, with liberty to apply.

The plaintiff and the defendant, his son, appealed separately against so much of the judgment as declared that the son had not become a partner and that the nomination could not be enforced.

The facts of the case were of a somewhat complicated character, and the evidence, which included a lengthy correspondence, was very voluminous.

Younger, K.C., and *MacSwinney*, for the plaintiff Henry Byrne, submitted that, inasmuch as Joyce J. had found that

Stanley Byrne had been duly nominated to one of the plaintiff's twelfth shares in the partnership business, the learned judge ought, as a necessary consequence of that finding, have gone on to direct that the nomination should be enforced as against the defendants Reid, Chalkley, and Moore.

[They were stopped by the Court.]

Arthur Chitty, for the defendant Stanley Byrne.

Hughes, K.C., and *J. Tanner*, for the defendants Reid, Chalkley, and Moore. It is submitted that the learned judge was right in his conclusion that the mere nomination of Stanley Byrne was not in itself sufficient to confer upon him the rights of a partner. To place him in that position it was necessary to obtain the acceptance of all the existing partners. A man cannot, against his will, be compelled to accept another as partner.

[ROMER L.J. referred to *Page* v. *Cox* (1) as shewing that a nomination by a partner, under the articles, of a person to a share in the business, is sufficient in itself to give that nominee an interest in the partnership.]

That was simply a case of a trust imposed by the obligation on the surviving partner created by the articles. A mere nomination by one partner does not entitle the nominee to specific performance as against the other partners: it is impossible to compel a man to enter into a covenant to carry on business with another, just as it is impossible to enforce specific performance of a promise to marry.

A clause in partnership articles empowering a partner to nominate a successor does not prevent the other partners, even though a successor has been nominated, from dissolving the partnership as against the original partner: *Ehrmann* v. *Ehrmann*. (2)

[ROMER L.J. In *Lovegrove* v. *Nelson* (3) Lord Brougham says that although, in order to make a person partner with others, their consent is necessary, no particular mode is required for giving that consent: it is sufficient if the partnership articles provide for the nomination by a partner of a successor,

(1) 10 Hare, 163.
(2) (1894) 43 W. R. 125.
(3) 3 My. & K. 1, 20; 41 R. R. 1, 2.

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this being a valid contract of which the Court will order specific performance.]

That is a mere dictum.

[*Younger, K.C.* The passage from Lord Brougham's judgment is quoted with approval in Lindley on Partnership, 6th ed. p. 368.]

[STIRLING L.J. The clause in the articles in *Ehrmann* v. *Ehrmann* (1) differs entirely from that in the present case.]

The terms upon which the person nominated may exercise his option of coming in must be strictly complied with: Lindley on Partnership, 6th ed. p. 435. Here the nomination was not made in accordance with the articles, for, whereas they require that the nomination shall be to a share "in the said business and the profits thereof," it was only to a share in the "profits."

Younger, K.C., in reply. *Wainwright* v. *Waterman* (2) is a further authority that a person when nominated as a partner has an actual interest in the partnership. [He also cited *Stocker* v. *Wedderburn* (3) and *Pigott* v. *Bagley*. (4)]

VAUGHAN WILLIAMS and ROMER L.JJ. came to the conclusion, upon the facts—agreeing with the findings of Joyce J. —that Stanley Byrne had been duly nominated and introduced into the firm for one-twelfth of the business and of the profits thereof, and that such nomination conferred upon him the right to be admitted as a partner as from the date of his nomination—it not being disputed that he was a fit person to be admitted as a partner—upon the conditions of his executing a necessary and proper deed of partnership and providing, as the correspondence shewed had been offered, his share of capital; also that the meaning of the undertaking given on behalf of the defendants, other than Stanley Byrne, in the consent order of March 29, 1901, was that they undertook to execute all such deeds as might be necessary or proper with reference to his introduction into the business, which undertaking must accordingly be complied with. ROMER L.J. in the course of his judgment intimated his opinion that, even

(1) 43 W. R. 125.
(2) (1791) 1 Ves. Jr. 311.
(3) (1857) 3 K. & J. 393.
(4) (1825) M'Cl. & Y. 569; 29 R. R. 850.

if there had been no such undertaking as was contained in the consent order, the Court would not have been powerless in the matter. Their Lordships accordingly held that the appeals must be allowed.

STIRLING L.J. I agree, as my brethren have agreed, with Joyce J. on his findings of fact, and I do not propose to deal with the questions of fact which arise in this case; but, as this is a case of some importance and difficulty, I desire to say a few words on the questions of law which arise upon it.

The first question of law which arises is as to the true construction of the 29th clause of the articles of partnership. Now, that clause provides as follows, subject to a certain proviso at the end: [His Lordship read the clause down to the proviso, and continued:—]

Now, the effect of that clause is, it appears to me, to give the father the right to nominate a son to become the holder of any part of the father's share in the business and the profits thereof; and, upon the son accepting such nomination, he is from that time to be entitled, during the residue of the term of the partnership, to carry on the business in partnership with the partners there called "the incoming partners." It imposes upon the son the duty, subsequently to his acceptance, not by way of condition precedent but by way of condition subsequent, of executing a certain deed. I think that, under that clause, as soon as the son accepted the nomination (and subject to the execution by him of a proper deed) he became entitled to the privileges which that clause says that he shall be entitled to.

Now, what took place was this, that on February 9, 1898, the father signed a document by which he says, "In accordance with the articles of partnership I hereby nominate my son Stanley to one-twelfth share of the profits of the business carried on." A point is made that, though the article says that the father may nominate a son and introduce him for the whole or a part of his, the father's, share in the business and the profits thereof, the nomination is for the profits only; and it is said that that is invalid. In my judgment, that is

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not the fair construction of the document. The document purports, on the face of it, to be made in pursuance of the articles of partnership. It plainly nominates the son to one-twelfth share of the profits of the business; and it seems to me that inasmuch as, according to the articles, the profits cannot be severed from the share in the business, which is a share in the capital, yet the true construction ought to be, on the maxim "Ut res magis valeat quam pereat," that it confers on the son some share of the business and profits. In my judgment, therefore, this document of February 9, 1898, was a valid nomination to one-twelfth share of the business and the profits.

Now, what in point of law was the effect of that? This is a matter on which there is extremely little authority, and the only authority upon it really consists of the passage which has been referred to from the judgment of Brougham L.C. in *Lovegrove* v. *Nelson* (1) and of the passage dealing with it in Lord Lindley's treatise on Partnership, 6th ed. p. 368. Lord Lindley says this: "If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission." Then he says: "Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions." And then he cites this passage from Lord Brougham's judgment in *Lovegrove* v. *Nelson* (2): "To make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required of giving that consent; and if three enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person who is no partner at all, shall name the successor to

(1) 3 My. & K. 1, 20; 41 R. R. 1, 2. (2) 3 My. & K. 20; 41 R. R. 2.

take the share of the one retiring, it is clear that this would be a valid contract which the Court must perform, and that the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name."

Now, adopting as I do those passages as a correct statement of the law, it seems to me to follow that the son Stanley on accepting this nomination became, in the eye of a Court of Equity, a partner and entitled to such relief as the Courts of Equity are in the habit of granting to persons who stand in the relationship of partners. That relief does not include as a general rule specific performance of an agreement to become partners—that is clearly settled; but it does not seem to me that any question as to this arises in the present case. There is other relief which Courts of Equity are in the habit of granting as between partners: for example, there may be an injunction granted to prevent one partner from excluding another. Again, there might be relief given in the shape of account, if necessary. And, further than that, there is a head of relief which is granted by Courts of Equity, namely, the execution of any necessary and proper deeds which may be required for defining the interests of the parties or giving effect to them. I need scarcely add that another form of relief which the Court of Equity would give—and indeed the form which is contemplated by the very action which is now before us—is dissolution, which in a proper case might be the result if any of the persons who were bound by the partnership agreement failed to perform the duties which arise out of the partnership relation.

In the present case, having regard to the form of the consent order which has been referred to and on which so much depends, all that we have to consider, beyond ascertaining the question of fact, appears to me to be this—whether in this case there arises a possibility that any deeds or instruments may require to be executed with reference to the introduction into the business of the defendant Stanley Byrne, to which introduction he is entitled as a consequence of the finding of fact.

Now, it seems to me that evidently there is one deed that

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must be executed. There is an obligation imposed, as I have already pointed out, by the 29th clause of the articles of partnership, on Stanley Byrne to execute a deed by which he will bind himself to observe the terms and conditions of the original articles of partnership with reference to the partners who are there termed the "incoming partners." That deed has not yet been executed, and, although I think that the absence of the execution does not, in the peculiar circumstances of this case, preclude Stanley Byrne from insisting on his right, yet it is alleged by the other defendants that he has been guilty of certain breaches of the stipulations contained in the original articles of partnership. That deed, therefore, will have to be carefully framed with reference to that fact, and so framed that those defendants will be placed in a position to enforce any rights which they may have by reason of any breach of those stipulations of which he may have been guilty. Further than that, I think that if the relationship of the partners is not clearly defined by the documents already in existence it would be within the power of the arbitrator to say that a deed ought to be executed by the defendants other than Stanley Byrne which would define that relationship between them. That form of relief was given in the case of *England* v. *Curling*. (1) But beyond that, it seems to me that, in the circumstances of this case, and having regard to the terms of the undertaking contained in the consent order, there is another deed to the execution of which Stanley Byrne will be entitled.

In cases which have arisen under wills the position of such nominees has been considered with reference to their relation to the surviving partner. A leading case is the case of *Page* v. *Cox*. (2) There, under articles of partnership, one of the partners had a power, if he left a widow surviving, to nominate her to carry on the partnership business with the surviving partner; and it was held that that could be given effect to. Turner V.-C. said that the result was that a trust was created, with reference to the partnership assets, for the purpose of enabling the widow to take that which was given to her and

(1) (1844) 8 Beav. 129. (2) 10 Hare, 163.

which attached to the partnership property. Now, in the view which I take, the son Stanley was nominated to succeed to one of his father's twelfth shares in the partnership business and profits: so that effect can be given in the same way as in *Page* v. *Cox* (1), by means of a trust attaching to the partnership assets; and, from the nature of the case, it seems to me that as regards that share he is entitled to have the legal title to the assets, to the extent of that share, vested in him jointly with his co-partners. Seeing that that is so, it seems to me that Stanley Byrne is plainly entitled to something more than mere damages for breach of contract, and that he is entitled to some specific relief of the nature which I have indicated. I feel compelled, therefore, to differ from the conclusion at which Joyce J. has arrived; for, though I agree with him that Stanley is not entitled to an order for specific performance, I think that he is entitled to some other relief of the kind which I have indicated.

I think, therefore, that these appeals ought to be allowed.

Solicitors: *Wood & Sons; Parker & Byrne; Letts Brothers.*

(1) 10 Hare, 163.

G. I. F. C.

C. A. 1902 July 18, 19.

BARNARD CASTLE URBAN DISTRICT COUNCIL *v.* WILSON.

[1901 B. 455.]

Water Supply—"Domestic Purposes"—Swimming-bath—School—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 56, 57.

The governors of a school, carried on as a charity and not for purposes of profit, constructed a swimming-bath for the use of the boys. The bath was in a building outside the main building of the school, but was connected with it by a corridor, and was separately rated for poor-rate. A swimming master was kept to teach the boys swimming, and a fee was charged for the use of the bath. This fee was compulsory for the boarders, but was charged to such only of the day boys as used the bath:—

Held, by the Court of Appeal (Vaughan Williams L.J. doubting), that under the circumstances the water supplied to the bath was not supplied for "domestic purposes," within the meaning of s. 12 of the Waterworks Clauses Act, 1863, but was supplied for the business of the school, and that consequently the water authority were entitled to make a special charge for the supply.

Decision of Buckley J., [1901] 2 Ch. 813, reversed.

Semble, that a supply of water to a swimming-bath for the use of the occupier of a dwelling-house and his family may be a supply for domestic purposes.

Per Vaughan Williams L.J.: A supply of water for domestic purposes is not limited to a supply inside the dwelling-house of the occupier, nor must it be a supply which is essential to the occupation, or even to the healthy occupation, of the house.

Water supplied for the purpose of making the occupation of a house more convenient, or for increasing its amenities, is primâ facie supplied for "domestic purposes."

Per Romer L.J.: The true test whether water is supplied for domestic purposes is not whether it is used by the occupier for the private purposes of himself and his household.

Regard must be had to the ordinary habits of domestic life and to what can reasonably be considered a "domestic purpose."

The test of reasonableness ought also to be applied to the quantity of water required, and regard should be had, not only to the consumer, but also to the obligation of the water authority to afford a supply to their district for ordinary domestic purposes.

In each case the Court must see whether the supply required is reasonably a supply for domestic purposes.

APPEAL from the decision of Buckley J. (1)

The plaintiffs were the urban sanitary authority for the

(1) [1901] 2 Ch. 813.

district of Barnard Castle, and were authorized under the Public Health Act, 1875, and the Acts incorporated therewith (which included the Waterworks Clauses Acts, 1847 and 1863) to provide, and they did provide, a water supply for the district. Under s. 56 of the Public Health Act they might charge for water a water rate assessed on the premises supplied, or might enter into agreements on other terms; by s. 58 they could supply water by measure; and by s. 65 they might supply water for trading purposes on such conditions as might be agreed upon between themselves and the persons supplied.

For the supply of water for domestic purposes the plaintiffs were in the habit of charging a water rate assessed on the net annual value of the premises, and this rate was assessed and levied with the general district rate in one sum. In their scale of charges no distinction was made for the supplying water for ordinary baths, though different charges were made for water supplied for various purposes, including a charge of 6*d.* per 1000 gallons for water supplied for trade purposes.

The defendants were the governors of the North-Eastern County School, Barnard Castle, which was a charity administered under a scheme settled by the Charity Commissioners in 1882. Under this scheme the school was not carried on for purposes of profit, but the tuition fees were treated as part of the income of the foundation, and any part not applied to the purposes specified in the scheme was invested in the name of the official trustee of charitable funds in trust for the foundation, in augmentation of its endowment.

The school had accommodation for 300 boarders and 50 day boys, and was supplied with water by the plaintiffs for drinking, washing, cooking, and other domestic purposes at the usual rate, and for cricket ground and steam-boiler by special agreement.

In 1896 the governors erected on their premises a swimming-bath with a cubical capacity of 35,000 gallons. The bath was in a building outside the main building of the school, but was connected therewith by a corridor, and was separately rated for poor-rate at 10*l.* per annum. The plaintiffs supplied the water for this bath under a special agreement till March, 1899,

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when they gave the governors notice that in future the charge for water for the swimming-bath would be 6*d.* per 1000 gallons, which was the usual price paid for water supplied in the district for trade purposes. The governors refused to agree to this; and the plaintiffs brought this action against them, claiming a declaration that the governors were not entitled to demand and receive from the plaintiffs a supply of water for the swimming-bath as for domestic purposes within the meaning of the Waterworks Clauses Acts, 1847 and 1863, as incorporated by the Public Health Act, 1875, and that the plaintiffs were entitled to payment from the defendants for the bath at the rate of 6*d.* per 1000 gallons, and that the plaintiffs were entitled to cut off the supply of water till payment was made, and an injunction to restrain the defendants from taking the water, except as water for purposes other than domestic purposes within the meaning of the Acts.

The prospectus of the school stated that a swimming-bath was provided, and that the swimming-bath fee was 3*s.* 6*d.* a term payable by every boarder. A swimming master was kept to instruct the boys, and a fee was paid by such day boys as used the bath.

Buckley J. held that the supply of water to the bath was a supply for "domestic purposes."

The plaintiffs appealed.

Upjohn, K.C., and *S. G. Lushington*, for the plaintiffs, in addition to the arguments urged in the Court below, referred, as to the meaning of the word "domestic," to the definition in the Century Dictionary, in Webster's Dictionary, and in *Smith* v. *Müller* (1); also to ss. 76 and 77 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 12 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93) (2), and *Busby* v. *Chesterfield*

(1) [1894] 1 Q. B. 192, 194.

(2) By s. 53 of the Waterworks Clauses Act, 1847, "Every owner and occupier of any dwelling-house . . . . within the limits of the special Act shall . . . . be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

By s. 12 of the Waterworks Clauses Act, 1863, "A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where

Waterworks and Gas Light Co. (1) The plaintiffs' contention is put very clearly, in the common-sense view, by Darling and Channell JJ. in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2), when referring to the present case. *Weaver* v. *Cardiff Corporation* (3) depended on the construction of a special Act, and the meaning of the word "baths," having regard to the context. In *Liskeard Union* v. *Liskeard Waterworks Co.* (4) the question was as to the meaning of "public purposes"; the case was not concerned with a statute dealing separately with "public purposes" as apart from "domestic purposes": it did not deal with the question of "business" at all. Sect. 53 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), says that every owner and occupier of a house can "demand" a supply of water for domestic purposes. That could not have been intended to cover a supply for swimming-baths, for fixed baths of any kind were, as a rule, unknown in 1847.

A. T. Lawrence, K.C., and *R. Cunningham Glen*, for the defendants. The question is as to the meaning of "domestic purposes" in s. 12 of the Waterworks Clauses Act, 1863.

[ROMER L.J. Supposing you find, as a fact, that a swimming-bath outside a house is being used solely for the purposes of recreation, while inside the house water is being used solely for domestic purposes, would you say that the swimming-bath is being used for "domestic purposes"?]

The real question is, What is the main object of this section? It deals with specific exceptions from "domestic" purposes, those exceptions not including a swimming-bath; and it is submitted that everything a man can do when he resides in a house comes within "domestic purposes" except what is expressly excepted. "Domestic" user is a large term, and may include most forms of user.

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such horses or carriages are kept for sale or hire or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

(1) (1858) E. B. & E. 176.
(2) [1902] 1 K. B. 310, 315, 316.
(3) (1883) 48 L. T. 906.
(4) (1881) 7 Q. B. D. 505.

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[ROMER L.J. Supposing a man uses an hydraulic lift in his house?

VAUGHAN WILLIAMS L.J. That might be said to be for the more convenient user of the house.]

An hydraulic lift would materially increase the rateable value of the house, so that the water company would not suffer. So, in the present case, assuming the swimming-bath to be part of the school premises, it adds to the rateable value of the school, and therefore entitles the company to a higher rate for the supply of water for the "domestic purposes" of the school.

In *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (1) it was held that an owner or occupier, who kept for his private use a carriage and a horse, was entitled to use water, supplied by the company for domestic use, for the horse and for washing the carriage. In *Weaver* v. *Cardiff Corporation* (2) it was held that water supplied to a fixed bath was supplied for domestic purposes. It is submitted that everything in respect of which the occupier is rated—which adds to the amount of his rating—falls under the term "domestic." In *Liskeard Union* v. *Liskeard Waterworks Co.* (3) it was held that a supply of water to a workhouse was a supply for domestic purposes, and that the inmates were to be treated as one family. In *Pidgeon* v. *Great Yarmouth Waterworks Co.* (4) it was held that a supply of water to an occupier who carried on the business of a boarding-house keeper, the water being used by the boarders for cleansing, cooking, drinking, and sanitary purposes, was a supply for domestic purposes. It may be admitted that if the primary object of the swimming-bath were the carrying on the business of teaching swimming the supply of water for the bath would come within the exception in s. 12. But this school is not one for teaching swimming. Its object is education generally. The swimming-bath is a mere incident.

[ROMER L.J. Must not the term "reasonable" be understood with regard to the amount of water used and the purpose for which it is used? Suppose a man had a ravine in his garden. Could he place a dam across the ravine and so construct a large

(1) E. B. & E. 176.
(2) 48 L. T. 906.
(3) 7 Q. B. D. 505.
(4) [1902] 1 K. B. 310.

swimming-bath, and demand a supply of millions of gallons of water for it?]

That case would be met by s. 17 of the Act of 1863, which imposes a penalty on any person supplied with water who "wilfully or negligently causes or suffers any pipe . . . . or other apparatus . . . . to be so used or contrived as that the water supplied to him by the undertakers is or is likely to be wasted, misused, unduly consumed, or contaminated." If each boy in the school took a separate fixed bath, the consumption of water might be as large as if all the boys used the swimming-bath. The plaintiffs supply water in order to make a profit, and they are also the rating authority of the district; they run no risk of loss. The Act should be construed in favour of the consumers.

[ROMER L.J. Suppose the boys were lodged in different masters' houses, as they are at Harrow, but there was one swimming-bath for the use of the whole school?]

Still the whole school would be under one management. There is nothing to prevent a combination of a number of persons each of whom is entitled to a supply of water for domestic purposes.

[ROMER L.J. Suppose the bath is used purely for recreation: could it be said that the supply of water would be for domestic purposes?]

A piano is an ordinary article of domestic furniture, but it is used only for recreation. Primâ facie the use of water for every domestic purpose is the right of the consumer, and this includes the amenities of the house: *Bristol Waterworks Co.* v. *Uren*. (1) There is no evidence that the school is carried on for the purpose of teaching swimming except the statement in the prospectus that a fee will be charged for the teaching of swimming. This is only an additional convenience. If swimming were not taught, the bath would be used for domestic purposes. Can the teaching of swimming make any difference? If the carrying on of the school is a business it is not a trade, and the special charge for water can be imposed only in the case of a business in the nature of a trade.

(1) (1885) 15 Q. B. D. 637, 648.

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Upjohn, K.C., in reply. If the defendants are right, every occupier within the district would be entitled to have a swimming-bath holding 35,000 gallons of water, and to have it emptied and refilled once in every week. It would be impossible for the plaintiffs to supply water in that way in addition to the supply for ordinary purposes, and it would be unreasonable to demand it. Where is the limit to be drawn? It is said it cannot be unreasonable to require the plaintiffs to supply the bath, because they are willing to do so if they can make a special charge. But the plaintiffs could not supply every occupier in this way, and if they make a special charge they can under their rules reserve the power to discontinue the supply in the event of scarcity of water, and in that way retain the power of performing their duty of supplying water for the necessary purposes of daily life. If the supply of water to the swimming-bath be for a domestic purpose, still the use of such a quantity of water would be an "undue consumption." The teaching of swimming is part of the business of the school. It is admitted that, if the teaching of swimming were carried on alone, it would be a business; it is not the less so because it is combined with other teaching.

VAUGHAN WILLIAMS L.J. In my judgment the decision of this case depends entirely upon a question of fact, as to which different minds may well arrive at different conclusions. According to my view, we have not very complete information as to the circumstances from which we have to arrive at the conclusion of fact. It would not, I think, be the proper way of approaching the question before us to ask whether the Legislature could have intended that a supply of water for large swimming-baths for schools should be included under the term "for domestic purposes." It seems to me that a great part of Mr. Upjohn's argument was based on this, that it was not likely the Legislature could have intended to put a water company or a local authority who supply water in such a position as that they would have to supply a large swimming-bath with water. We ought, I think, to look at the words of the statute, and unless their natural construction would lead

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to some absurd result we ought to give that construction to them. Now s. 53 of the Waterworks Clauses Act, 1847, provides that "every owner and occupier of any dwelling-house" within the district "shall be entitled to demand and receive a sufficient supply of water for his domestic purposes." We have to say what is the meaning of the phrase "for his domestic purposes" when used in relation to "owner or occupier of any dwelling-house." From the cases which have been decided upon that section it is clear that it could not be said that the domestic purpose is only one which has to be attained inside the dwelling-house of the occupier, nor that it must be such as is essential to the occupation of the house, or even to the healthy occupation of the house. It is plain on the authorities that there is no such limitation of the meaning of "domestic purposes." Before dealing with those authorities I wish to say a word about s. 12 of the Waterworks Clauses Act, 1863. [His Lordship read the section.] The inference which I draw from those express statutory exceptions is that the things thus excepted would before the Act of 1863 have fallen within the term "domestic purposes" in s. 53 of the Act of 1847, and that it was necessary there should be an express statutory exception to take them out of that section. A remarkable instance of what was held to be included under the term "domestic purposes" before the Act of 1863 is to be found in *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (1), in which it was held that an occupier, who kept a carriage and a horse for private use, was entitled to call on the water company to supply him under the head of "domestic purposes" with water for the horse and for washing the carriage. In giving judgment Lord Campbell C.J. said (2): "The horse and carriage were for private use, and were kept on the premises; that being so, the water used for them was applied to domestic use. If that be not so, I do not see how we are to distinguish between a horse so kept and a dog or cat. The horse and carriage are kept for the use of the occupier of the house, for his health and enjoyment, in an outhouse belonging to his premises." In that judgment Erle J. and Crompton J. agreed.

(1) E. B. & E. 176. (2) E. B. & E. 182.

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After that decision it seems to me impossible to say that water supplied for the purpose of making the occupation of a house more convenient, or for increasing its amenities to the owner or occupier, is not supplied for domestic purposes. That decision was approved in *Bristol Waterworks Co.* v. *Uren* (1), where A. L. Smith J., who delivered the judgment of the Court, said (2): "In our judgment, water used for the mere amenities of the house, such as, in this case, the watering of the pleasure-garden surrounding and attached to and occupied with the house, may legitimately and fairly be held to be used for domestic purposes within the meaning of the statute in question." The use then of water for the more convenient occupation of a house or for increasing its amenities to the owner or occupier is primâ facie a use for domestic purposes. And I do not think you can cut down the rule by saying that the user must be one which is a usual one, and that it is not usual to have a swimming-bath in a dwelling-house, and therefore water supplied for it is not a "domestic" use within the meaning of the section. I cannot agree with that view. If that were the true rule, I think the Courts would have been obliged to hold that a supply of water for a fixed bath is not a supply for domestic purposes, for when the Act of 1847 was passed the houses in the United Kingdom which had not a fixed bath were in a large majority, and even now in the twentieth century I am convinced that they are still in a majority. I think, therefore, that the true definition of "domestic purposes" is that which I have already stated. Another limitation which has been suggested in the course of the argument is that the user must be reasonable with reference to the capacity of the water company or the water authority to supply their district. In the present case the plaintiffs admit their capacity to supply the defendants' swimming-bath, but they say they are entitled to make a special charge for so doing. Then it was said, suppose every occupier in the district wanted a supply of water for a swimming-bath. But you must construe the Act of Parliament having regard to the real facts, and it is idle to suggest that every one would want a supply of water for a swimming-

(1) 15 Q. B. D. 637. (2) 15 Q. B. D. 648.

bath. Then it was said that the supply required must be reasonable as regarded the subject-matter. I cannot find either in the Act or in any of the decided cases any trace of such a limitation. As regards the exception in s. 12 of the Act of 1863, that "a supply of water for domestic purposes shall not include a supply . . . . for any trade, manufacture or business," I agree that the carrying on of a school is the carrying on of a business. But I also agree with Buckley J. that the fact that a house is used for the purpose of a business does not prevent the use of water for domestic purposes within that house. The mere fact that in such a house there is a swimming-bath does not make the supply of water to the bath a supply for the purposes of the business. It may still be a supply for the domestic purposes of the residents in the house. The conclusion at which Buckley J. arrived was that this swimming-bath was used in order that the occupation of the house by the boys might be a healthy one; and if that were so, the supply of water to the bath would be for "domestic purposes," and not for the business of the school. It is said that this conclusion of fact is wrong, and that we ought to hold that the bath is really used for the purpose of teaching swimming to the boys. I understand that my learned brethren have come to the conclusion that this is the object of the bath, and I do not wish to differ from them upon this question of fact, though I should have preferred to have further information upon this point. I assent, therefore, to the appeal being allowed, on the ground that the bath is used for the purpose of making the teaching of the school more effectual, and not for the purpose of making the occupation of the house more convenient. But I do not intend to decide that a supply of water to a swimming-bath is necessarily in every case a supply for non-domestic purposes.

ROMER L.J. I agree. But as the case gives rise to some questions of general importance I think it right to state my view of them. It has been argued that the only test whether a supply of water is required for domestic purposes is, whether the water is used and consumed by the occupier of the house for the private purposes of himself and his household. In my

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opinion that is too wide a proposition, and it is not the right test. For instance, suppose that water supplied at high pressure (as it generally is) were used by an occupier as a motive power to drive a dynamo for the purpose of lighting his house by electricity. In my opinion it could not be said that such a user of the water would be a use for domestic purposes. Again, suppose a man had a very large garden attached to his house: could he call upon a water company to fill with water a pond which he chose to dig in his garden for the purpose of boating? I think such a use of the water would not be for domestic purposes. It appears to me that regard must be had to the ordinary habits of domestic life in this country, and also to what can reasonably be considered a domestic purpose. And I think the test of reasonableness ought also to be applied to the quantity of water required. I think this is shewn by s. 17 of the Act of 1863, which imposes a penalty on any person supplied with water who "wilfully or negligently causes or suffers any pipe . . . . or other apparatus . . . . to be so used or contrived as that the water supplied to him . . . . is or is likely to be wasted, misused, unduly consumed, or contaminated." In determining what can reasonably be considered a "domestic purpose," I think you ought to consider not only the consumer, but also the obligation of the water company or authority to afford a compulsory supply to their district for domestic purposes. It is a serious question whether in every case in which an occupier desires to have a supply of water for his enjoyment and pleasure the water company or authority are bound to supply him without regard to the ordinary requirements of their district for the purposes of drinking, washing, and sanitation. Let me give an example of what I mean. I agree that a householder might allow his dog or his cat to drink the water supplied for domestic purposes and might use the water for washing them. So again, as has been decided, he might use the water for washing his horse and carriage and for watering the horse. There must, however, be some limitation. Suppose a wealthy proprietor chose to keep other tame animals—for instance, a tame elephant—would it be reasonable for him to call upon a water

company to supply him with water to fill a special bath for the elephant? In my opinion that would not be a supply for domestic purposes. So again, it might be reasonable to use the water to fill a small tank for gold-fish. But suppose an occupier desired to keep a private aquarium, I should not be inclined to hold that he could require a water company to furnish him with a supply of running water for it. In my opinion you must approach the consideration of each case with some regard to what is reasonable, and see in each case whether the supply of water which is wanted is reasonably a supply for domestic purposes. I am not prepared to hold that in every case a supply of water to a swimming-bath constructed by the occupier of a house would be a supply for domestic purposes. Suppose an occupier who had a large garden chose to construct in it a large swimming-bath for his pleasure or recreation: in such a case, in my opinion, he would not be entitled to require a water company to supply water to the bath. Looking at the circumstances of the present case, I think the water for the bath is not required for domestic purposes. In my judgment, the bath was really constructed and is required for the purposes of the business of the school, and not for the domestic purposes of the school considered as the domus or home of the boys.

STIRLING L.J. This case is one of some difficulty. The question arises upon the construction of two sections in two Acts of Parliament, which have already created difficulties and will probably do so again. I wish to confine my observations to this particular case, and not to deal with any general propositions of law. It is plain from the decided cases that the words "domestic purposes" in s. 53 of the Act of 1847 ought to receive a wide construction. This is shewn by *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (1) Still the words cannot be treated as having an unlimited meaning. And I am not prepared to say that the cases which are excepted by s. 12 of the Act of 1863 would but for that exception have been included under "domestic purposes" in s. 53. I think that some of the exceptions were mentioned merely by way of pre-

(1) E. B. & E. 176.

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caution. In *Busby* v. *Chesterfield Waterworks and Gas Light Co.* (1) the decision was based on the fact that the horse and carriage were kept for private use; if they had been kept for the purpose of being jobbed for hire, the decision would or might have been different. The question in the present case is, whether a supply of water to a swimming-bath at a school is a supply for domestic purposes or for the purposes of the business of the school. For myself I am not prepared to say that, if the occupier of a house constructed a swimming-bath for the use of himself and his household, a supply of water to it would not be for domestic purposes. For the present purpose I will assume that it would. But if the occupier carried on the business of teaching swimming and used the bath for the purpose of giving lessons in swimming, in my opinion that would not be a use of the water for domestic purposes. The present case lies between the two cases which I have put. I agree with the conclusion of Buckley J. that the carrying on of the school is a "business," and I think that a supply of water to the house in which the scholars live would be a supply for domestic purposes. But, looking at all the circumstances of the case, I have come to the conclusion that this swimming-bath is used, not for the purposes of the school considered as the home of the boys, but for the purposes of the business of the school, especially having regard to the prospectus in which the swimming-bath is put forward as one of the advantages of the school, and it is stated that a separate fee is charged for the use of it. In my opinion the bath is used for one of the educational purposes of the school; in other words, it is used for the business of the school. Upon this question of fact I differ with the greatest respect from the conclusion of Buckley J.

Solicitors: *Doyle, Devonshire & Woodhouse, for J. Ingram Dawson, Barnard Castle; Huntington & Leaf, for A. T. Piper, Barnard Castle.*

(1) E. B. & E. 176.

W. L. C.

GREAT WESTERN RAILWAY COMPANY *v.* TALBOT.

C. A. 1902 July 4, 5, 7, 28.

[1900 G. 1173.]

Railway Company—"Accommodation Works"—Grant of Easement—Level Crossing—Extent of Landowners' Right of User—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 20), *ss.* 16, 68–76.

Under the provisions of the Railways Clauses Consolidation Act, 1845, for the construction by a railway company of "accommodation works" for the benefit of a landowner whose land is severed by the railway, the landowner is entitled to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway causes by severance in the working or use of his land, including any alteration or extension of that working or use which could or ought to have been contemplated by the parties when the accommodation works were made and accepted.

Great Northern Ry. Co. v. *M'Alister*, [1897] 1 I. R. 587, 602, approved and adopted.

A railway severed the land of a landowner and crossed on the level a road belonging to him upon which he had a tramway by which goods and traffic from his land were conveyed to a neighbouring port. He had also allowed coals to be conveyed along the tramway to the port from a colliery not situate on his land. On the occasion of the purchase by the railway company of the portion of the road crossed by the railway and of other land belonging to him taken by the company, the company entered into an agreement with him that they would construct and maintain certain works "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway." These works included a level crossing for the tramway. The level crossing was constructed, and the company entered into a deed of covenant with the landowner in accordance with the agreement. The landowner's successor in title afterwards claimed to be entitled to convey over the level crossing goods and traffic brought on to her land from other places, whether situate on her estate or not:—

Held, by the Court of Appeal, that she was not entitled to use the level crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at or previously to the date of the deed of covenant, or as since enjoyed by her or her predecessors in title, if, owing to acquiescence or otherwise, that subsequent enjoyment was binding on the company.

Decision of Kekewich J. reversed.

APPEAL from a decision of Kekewich J.

The question was as to the extent to which the defendant, Miss Talbot, was entitled to use a level crossing over a railway

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in South Wales belonging to the Great Western Railway Company, at a point where a tramway belonging to the defendant crossed the plaintiffs' railway.

The facts were thus stated in the judgment of Stirling L.J. The railway now vested in the plaintiff company was originally constructed in the neighbourhood of the place in question by the South Wales Railway Company (incorporated by the South Wales Railway Act, 1845). The railway intersected the Talbot estate, of which the defendant is now the owner, and a contract was entered into between the South Wales Company and Mr. Christopher Rice Mansel Talbot, the defendant's predecessor in title, for the purchase by that company of certain lands required by them for the purposes of their undertaking, and it was at the same time agreed (as stated in a deed of March 13, 1868, hereafter mentioned) that the company "should make certain works for the accommodation of the owners or owner for the time being of the lands adjoining their railway on both sides thereof where it intersected the lands of the said C. R. M. Talbot." The South Wales Company was in 1863 amalgamated with the Great Western Railway Company. Before the amalgamation the purchase-money for the land agreed to be sold was paid, and the accommodation works stipulated for were constructed by the South Wales Company, but no conveyance to them of the lands bought by them from Mr. Talbot was executed.

By two deeds dated respectively March 13, 1868, Mr. C. R. M. Talbot and other persons interested in the Talbot estate duly conveyed these lands to the Great Western Company, and by another deed of even date, made between the Great Western Railway Company of the first part, Mr. C. R. M. Talbot of the second part, Theodore Mansel Talbot of the third part, and William Llewellyn of the fourth part, the Great Western Company entered into covenants with the other parties that they, the Great Western Company, their successors and assigns, would from time to time and at all times thereafter maintain respectively all the works specified in the schedule thereto "for the accommodation of the owners and occupiers for the time being of the lands adjoining the said railway."

The schedule included the following :—

"The level crossing for the highway to Courtycha Farm and Port Talbot.

"The level crossing for the railway leading from the Oakwood Ironworks to Port Talbot.

"The level crossing for the tramroad leading from the Margam Tinworks to Port Talbot."

At the date of the deed these three level crossings ran side by side. At the date of the action the latter two had been united into one, and the question in the action related to that one.

The plaintiffs claimed a declaration that the defendant was not entitled to use the level crossings for the purpose of bringing over them any goods or traffic from the Cwm Avon Works, or to or from any other works or place which was not served by one or other of the two lines of rails which in 1868 passed over the level crossings, and an injunction to restrain the defendant from using the level crossings otherwise than in accordance with the declaration.

The Cwm Avon Works were situate on land belonging to the Earl of Jersey, not to the defendant.

The plaintiffs claimed in the alternative a declaration that the defendant was not entitled to use the level crossings except for the purpose of bringing goods or traffic to or from places on her own estate, and an injunction to restrain her from using the level crossings otherwise than in accordance with that alternative declaration.

By her defence the defendant claimed to be entitled to bring over the level crossings goods and traffic brought on to her land from the Cwm Avon Works, situate on land of the Earl of Jersey, but she denied that this would increase the burden of any easement theretofore enjoyed by her or her predecessors in title over the level crossings. She also claimed to be entitled to bring over the level crossings goods and traffic brought on to her land from other places, whether those places were or were not served by either of the tramways in 1868, and whether they were or were not situate on her own estate.

Kekewich J. held that the grant by the Great Western

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Company to Mr. Talbot was part of the price paid to him for the purchase of his land, and, there being nothing in the grant to limit the user, there was no reason why the defendant should not use the crossings for any purpose she pleased, provided that the user must not interfere with the traffic of the Great Western Company.

The Court of Appeal came to the conclusion upon the evidence that, at and prior to the date of the deed of covenant of 1868, the tramroad leading from the Margam Tinworks to Port Talbot was, with the assent of Mr. Talbot, used for the purpose of bringing coals to Port Talbot from coal pits situate at Tewgoed on land belonging to the Earl of Jersey.

The plaintiffs appealed.

Cripps, K.C., P. O. Lawrence, K.C., and *Howard Wright*, for the plaintiffs. It is submitted that this level crossing is an "accommodation work" within the meaning of s. 68 of the Railways Clauses Consolidation Act, 1845.

That being so, accommodation works are made only for the use of the landowner whose lands are severed by the railway, and their user must be limited with regard to the condition and user of the land at the time when the severance takes place: *Rhondda and Swansea Ry. Co.* v. *Talbot* (1); *Midland Ry. Co.* v. *Gribble* (2); *Reg.* v. *Brown* (3); *London and North Western Ry. Co.* v. *Runcorn Rural Council.* (4) An Irish authority to the same effect is *Great Northern Ry. Co.* v. *M'Alister.* (5) The defendant is not entitled to bring traffic arising outside her own land across the plaintiffs' line. She claims in substance the right to bring traffic coming from any distance, however great. This might cause serious inconvenience to the working of the plaintiffs' line. It is submitted that the defendant is entitled to use the level crossing only for the purposes of her own land, and not to bring an entirely new traffic across the plaintiffs' line. At the time of the severance the only user of the tramway for traffic outside Mr. Talbot's

(1) [1897] 2 Ch. 131.
(2) [1895] 2 Ch. 827, 829.
(3) (1867) L. R. 2 Q. B. 630.
(4) [1898] 1 Ch. 34, 42, 561.
(5) [1897] 1 I. R. 587, 602.

land was for the carrying of coals from the Tewgoed Collieries situate on Lord Jersey's land. At any rate, the defendant is not now entitled to use the level crossing for any outside traffic other than that from those collieries. That user was allowed to the lessee of the Margam Works, but it cannot be extended, as the defendant claims, to any traffic arising anywhere. The accommodation works provided by the company were those prescribed by the Railways Clauses Act, though the arrangement was carried out by means of the deed of covenant. The statutory "accommodation works" are limited to the provision of communication between the two parts of the land which are severed by the railway. The defendant may rely upon *United Land Co.* v. *Great Eastern Ry. Co.* (1); but there the decision turned upon the special words of the grant, and it does not conflict with *Reg.* v. *Brown.* (2) For the same reason *Finch* v. *Great Western Ry. Co.* (3) is distinguishable. The plaintiffs do not object to the user of the crossing for the purposes of the defendant's own estate; they object to its user for outside through traffic. *Dand* v. *Kingscote* (4) depended on the terms of the grant.

Warrington, K.C., *S. T. Evans, K.C.*, and *Mark Romer*, for the defendant. The broad question is whether the defendant is entitled to use this level crossing for traffic which does not originate upon or is not going to her own estate. It is said that the level crossing must be treated just as if it were an "accommodation work" under the Act. It is submitted that this is not the way to deal with the case. The parties did not rely upon the statutory rights, but they substituted an agreement, and the question is what is the true construction of the documents. The transaction must be looked at as a whole. The contract between the parties was that the land required by the company (including the portion of the road which was crossed by the railway) should be sold to them, but that the right of user of the tramway should continue as it was before, subject only to the reasonable user of the railway. This is in

(1) (1875) L. R. 10 Ch. 586.
(2) L. R. 2 Q. B. 630.
(3) (1879) 5 Ex. D. 254.
(4) (1840) 6 M. & W. 174; 55 R. R. 560.

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accordance with what was said by the Court of Appeal in *United Land Co.* v. *Great Eastern Ry. Co.* (1), and the decision of Kekewich J. in the present case is to the same effect. The Court can look only at the conveyance and the deed of covenant of March 13, 1868. In both *Rhondda and Swansea Ry. Co.* v. *Talbot* (2) and *Reg.* v. *Brown* (3) the material question was, not as to the user of the accommodation works when they had been constructed, but as to the nature of the works which the company could be compelled to execute. The works having been constructed, the landowner can use them for any reasonable purpose. He could not, of course, e.g., use a bridge in such a way as to break it down. He could not impose on the company a greater burden for its maintenance. The true explanation of the decision in *Great Northern Ry. Co.* v. *M'Alister* (4) is that the proposed user of the level crossing by the defendant would have required the construction of other works by the company, and that it would have endangered the use of the railway.

The cases on which the plaintiffs rely related to "accommodation works" in the strict sense of the term, i.e., statutory works; this level crossing is not a statutory accommodation work. The Court is not at liberty to inquire into the origin of the goods which are carried over the crossing: *Williams* v. *James* (5); *Chadwick* v. *Marsden.* (6)

As to the right of the defendant to grant a licence to use the tramway, see *Mitcalfe* v. *Westaway.* (7)

July 28. STIRLING L.J. read the judgment of the Court (Vaughan Williams, Romer, and Stirling L.JJ.), in which, after stating the facts, he continued:—It appears on the face of the deed of covenant of March 13, 1868, that the works specified in the schedule were executed in pursuance of an agreement between a railway company and a landowner whose lands were about to be intersected by the company's railway, and that those works were to be "for the accommodation of the owners

(1) L. R. 10 Ch. 586.
(2) [1897] 2 Ch. 131.
(3) L. R. 2 Q. B. 630.
(4) [1897] 1 I. R. 587, 602.
(5) (1867) L. R. 2 C. P. 577.
(6) (1867) L. R. 2 Ex. 285.
(7) (1864) 34 L. J. (C.P.) 113.

and occupiers for the time being of the lands adjoining the railway."

By the group of clauses (ss. 68–76) of the Railways Clauses Consolidation Act, 1845, under the heading "And with respect to works for the accommodation of lands adjoining the railway," the Legislature has imposed on railway companies an obligation to make and maintain such accommodation works in cases in which the railway causes interruptions to the use of lands through which it is made; and by s. 16 of the same Act powers for the purpose of constructing such works are conferred. On the other hand, the Legislature has not seen fit expressly to authorize a railway company to make general grants of easements over lands acquired for the purposes of its undertaking; and in *Mulliner* v. *Midland Ry. Co.* (1) it was laid down by Jessel M.R. that (with some exceptions which do not affect the present question) a railway company has no right to sell, grant, or dispose of such land, or of any easement, or right of way over it, except for the purposes of the company's Act, that is, with a view to the traffic of the company (2); and it was there held by him that a grant of such a right of way was ultra vires. The principle of this case was approved by Lord Blackburn in *Ayr Harbour Trustees* v. *Oswald* (3), and has recently been applied by the Court of Appeal in *Great Western Ry. Co.* v. *Solihull Rural Council.* (4) Bearing these considerations in mind, we think that the natural meaning of the expression "works for the accommodation of owners of lands adjoining" the plaintiffs' railway in the deed of covenant is works of the kind contemplated by ss. 68–76 of the Railways Clauses Consolidation Act, 1845; and that the object of the deed was to secure the maintenance by the plaintiff company of works which had been executed by their predecessors in title in order to fulfil the obligation imposed on them by those sections. Now, as is pointed out by Lindley L.J. in *Rhondda and Swansea Ry. Co.* v. *Talbot* (5), it has been decided in *Reg.* v. *Fisher* (6) and *Reg.*

(1) (1879) 11 Ch. D. 611.
(2) Ibid. 623.
(3) (1883) 8 App. Cas. 623, 634–5.
(4) (1902) 18 Times L. R. 707.
(5) [1897] 2 Ch. 137.
(6) (1862) 3 B. & S. 191.

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v. *Brown* (1) that "the accommodation works which the company may be required to make are such accommodation works as are required at the time the land is taken, having regard to its then use, and not accommodation works which may be required when the character of the land, and perhaps the nature of the neighbourhood, is entirely altered years afterwards." Further, it has been decided, first by Chatterton V.-C. and then by the Court of Appeal in Ireland, in *Great Northern Ry. Co.* v. *M'Alister* (2), that the landowner having obtained accommodation works (in that case, as in this, a level crossing) suitable for his land at a time when it was used for agricultural purposes was not entitled to use those works for the purposes of traffic in minerals quarried from the same lands. In the course of his judgment FitzGibbon L.J. thus defined the rights of the landowner (3): "The owner of the adjoining lands was entitled, when the railway was made, to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway caused by severance in the working of his farm, including, I should say, any alteration or extension of that working which could or ought to have been contemplated by the parties when the accommodation works were made and were accepted." With that decision and definition we agree.

It appears that at and prior to the date of the deed of covenant of 1868, "the tramroad leading from the Margam Tinworks and Forges to Port Talbot" extended beyond those works to a point where the river Avon is crossed by a bridge, and was there connected with another tramroad which crossed the bridge and ran on land belonging to Lord Jersey to some coal pits at Tewgoed demised by him to the same person who was lessee under Mr. C. R. M. Talbot of the Margam Works; and further, that the tramway was used, with the assent of Mr. Talbot, for bringing goods, consisting principally of coal, from those pits, not only to the Margam Works but also to Port Talbot, where the coal was shipped for the benefit of the lessee. The Margam Works have been discontinued, but the

(1) L. R. 2 Q. B. 630. (2) [1897] 1 I. R. 587, 602.
(3) [1897] 1 I. R. 605.

defendant claims the right to bring over the level crossing goods and traffic from Cwm Avon Works, and states that by so doing she will not increase the burden of any easement hitherto enjoyed by her or her predecessors in title over the crossing. The plaintiff company dispute the validity of this claim; but it seems to us that such a user, so far as regards the Tewgoed Collieries, must be taken to have been fairly within the contemplation of the parties at the time when the works were executed. The defendant, however, further claims, by her defence, "to be entitled to bring over the said crossing in manner aforesaid, goods and traffic brought on to her land from other places, whether such places were or were not served by either of the said tramroads in the year 1868, and whether they are or are not situate on her estate." The defendant does not state that the burden of the easement hitherto enjoyed by her will not be increased by such a user of the crossing, and we think it plainly may be, for, if this claim be valid, the defendant will be entitled to carry over this crossing the whole traffic of the recently constructed Port Talbot Railway, which has a station close to the level crossing. Such a user, in our opinion, goes far beyond anything which could have been within the contemplation of any one when the works were made.

This conclusion does not seem to us to conflict with the decision in *United Land Co.* v. *Great Eastern Ry. Co.* (1), which turned on the provisions of a very special enactment, requiring the railway company to construct such convenient communications across, over, or under the railway as should in the judgment of the Commissioners of Woods and Forests be necessary for the convenient enjoyment and occupation of the lands there in question, which were Crown property.

We think, therefore, that the appeal should be allowed, and that an order ought to be made to the following effect: Discharge the order appealed from. Declare that the defendant is not entitled to use the level crossings for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character,

(1) L. R. 10 Ch. 586.

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nature, or extent as enjoyed at or previous to March 13, 1868, or as since enjoyed by the defendant or her predecessors in title, if, owing to acquiescence or otherwise, such subsequent enjoyment is now binding on the plaintiffs. And declare that the defendant is entitled to bring goods from the Tewgoed Collieries across the level crossings substantially as the same were brought at or previous to March 13, 1868, but so that the burden of the easement is not increased as aforesaid.

As regards the costs, if this declaration had been made in the Court below, each party would in part have succeeded, and in part failed. In this Court the appellants succeed to a substantial extent. There will, therefore, be no order as to costs in the Court below, but the respondent will be ordered to pay the appellants' costs of the appeal.

Solicitors: *R. R. Nelson; Cheston & Sons.*

W. L. C.

C. A. 1902 *Aug.* 4, 5.

DYER *v.* LONDON SCHOOL BOARD.

[1901 D. 2265.]

Elementary Education — School Board — Pupil Teachers' Centres — Higher Education—School Building—Local Rates—Expenditure—Ultra vires—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75).

It not being within the powers of a school board to expend money raised by local rate upon any education other than elementary—*Reg.* v. *Cockerton*, [1901] 1 K. B. 726—the London School Board was restrained by injunction from expending moneys arising from the local rates of the metropolis in the erection of a building as a "pupil teacher centre," that is, a school for providing pupil teachers with an education beyond what was strictly elementary.

THE defendants, the School Board for London, are the school board appointed under s. 37 of the Elementary Education Act, 1870, for the school district of the metropolis as defined by that Act.

By s. 3 of that Act an "elementary school" is defined as "a school or department of a school at which elementary education is the principal part of the education there given";

and the term "teacher" includes "pupil teacher . . . . and every person who forms part of the educational staff of a school."

By ss. 5 and 19 the School Board for London are authorized to provide public elementary schools for their district.

Sect. 35 authorizes the school board to appoint officers, including the "teachers required" for any school provided by the board, at such salaries or remuneration as they think fit.

Sect. 53 provides that the expenses of the school board shall be paid out of a fund called "the school fund"; and s. 54 provides that "any sum required to meet any deficiency in the school fund, whether for satisfying past or future liabilities, shall be paid by the rating authority out of the local rate."

Sect. 13 of the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), enables a school board to be constituted trustees for any educational endowment or charity for purposes connected with education, provided that the purposes of such endowment or charity are not inconsistent with the principles on which the school board are required by s. 14 of the Act of 1870 to conduct schools provided by them; and that every school connected with such endowment or charity shall be deemed to be a school provided by the school board, except that nothing in the section shall authorize the school board to expend any money out of the local rate for any purpose other than elementary education.

The defendants were carrying on within the metropolitan district, under the sanction of the Government Board of Education, certain establishments, with suitable buildings, called "pupil teachers' centres," for the purpose of training persons from about fourteen to twenty-four years of age as pupil teachers, and also adult persons generally, and preparing them for admission to the training colleges so as to enable them to earn their own living by the exercise of the profession of a teacher and by obtaining employment in that capacity. The persons so trained were under no obligation to enter the defendants' service, and a great number never in fact did so.

The education afforded at those centres was not "elementary" in the strict sense, and was not intended for children at

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all, nor even for persons of maturer age coming from or resident in the London School Board district only, but it was open equally to persons coming from or resident in places outside such district. The centres had teaching staffs of their own wholly unconnected with any of the defendants' public elementary schools, and the expenses of providing and carrying on the centres were defrayed out of moneys arising from the local rate.

In 1901 the education both at the "public elementary schools" and also at the "pupil teachers' centres" was being regulated by the Day School Code of that year, issued by the Government Board of Education and described as "Code of Minutes of the Board of Education presented to Parliament pursuant to the 97th section of the Elementary Education Act, 1870, and to lie on the Tables of both Houses for one month." In that Code—from which the Code for 1902 did not substantially differ—art. 15 prescribed the subjects for instruction in "public elementary schools." Then, under the separate head of "Teachers," it was stated, in art. 31, that among the teachers "recognised" by the Board of Education were "pupil teachers." Art. 34 defined a pupil teacher as "a boy or girl engaged by the managers of a public elementary day school on condition of teaching during school hours under the superintendence of the principal teacher, and receiving suitable instruction." The article proceeded: "The managers are bound to see that the pupil teacher is properly instructed during the engagement," the conditions of the engagement of a pupil teacher being set forth in detail in the form of a memorandum of agreement given in Sched. VI. and from which "no departure is allowed." Subsequent articles contained regulations for "central classes" for the instruction of pupil teachers and for the commencement of the engagement of a pupil teacher—at which time he or she must be not less than fifteen years of age—the length of the engagement, which would ordinarily be three years, or, in rural schools, four years, and for an examination, in each year of the engagement, according to the curriculum comprised in Sched. V. The subjects of this curriculum extended in range each year, and

were much beyond what is commonly regarded as "elementary education." Under art. 45 pupil teachers, at the termination of their engagements, were to be free to choose their employment. If they wished to continue in the profession of elementary school teachers, they might, under certain required conditions, become (*a*) students in training colleges, (*b*) assistant teachers, or (*c*) provisionally certified teachers. In the form of memorandum of agreement given in Sched. VI., for the engagement of a pupil teacher by a school board, clause 5 was as follows: "The school board shall cause the pupil teacher to receive without charge, from a certificated teacher, or other qualified teacher approved by the Board of Education, special instruction, including practical instruction in teaching, during at least five hours per week, of which hours not more than three shall be part of the same day. Such special instruction, and any instruction in secular subjects given to the pupil teacher during school hours, shall be in the subjects in which the pupil teacher is to be examined during this engagement, pursuant to the Code." Art. 73, in fixing the "minimum school staff," recognised "pupil teachers" as members of the staff.

By a provisional order made in 1900 by the Board of Education pursuant to s. 20 of the Elementary Education Act, 1870, the defendants were authorized, for the purposes of the Elementary Education Acts, 1870 and 1873, to acquire under the compulsory powers of the Lands Clauses Acts certain pieces of land described in the schedule to the order. One of the pieces of land so described consisted of a house and premises called The Elms, Hildrop Road, in the parish of St. Mary, Islington. The provisional order was confirmed by the Education Board Provisional Order Confirmation (London) Act, 1900 (63 & 64 Vict. c. cxcvii.), s. 4 of which provided that if the School Board for London did purchase the premises called The Elms, the same should not, during the period ending September 29, 1951, be used by the school board "otherwise than for the purposes of a pupil teachers' centre."

The defendants, in the exercise of their compulsory powers so given, proceeded to purchase the said premises, with the

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intention of erecting thereon a building to be used solely for the purpose of a pupil teachers' centre, and, as in the other cases above mentioned, to defray the expenses of providing and carrying on the establishment out of moneys produced by the local rate.

This expenditure was objected to by ratepayers of the parish as being ultra vires; and in his audit of the accounts of the defendants for the half-year ending Michaelmas, 1901, Mr. T. B. Cockerton, the auditor of the Local Government Board, acting under the provisions of the Elementary Education Acts, disallowed the sum of 27*l.* 10*s.* 11*d.* paid for lithographing twenty-one copies of bills of quantities in reference to the erection of the proposed building, on the ground that it was a payment illegally made out of the funds of the defendants, the school board; and he surcharged with that amount the two members of the school board who had authorized the making of that illegal payment. In his certificate he gave the following reasons for his disallowance: (1.) because the said sum was not paid in respect of the erection of a public elementary school within the meaning of the Elementary Education Acts; (2.) because school boards were not legally entitled to erect at the cost of the school fund schools or other buildings for the instruction of pupil teachers exclusively; (3.) because the said sum was not expended in the provision of accommodation in public elementary schools for the district of the said school board within the meaning of s. 5 of the Elementary Education Act, 1870, or any of the Acts amending the same; (4.) because the said sum was paid in respect of the erection of a building for the provision of education in subjects not allowed, provided for, or recognised by the Education Code; (5.) because the said sum was paid in reference to the erection of a building for the provision of instruction of teachers, pupil teachers, or other persons who did not form part of the educational staff of a public elementary school within the meaning of the Elementary Education Acts; and (6.) because the said school board had not any authority in law to pay the said sum and to charge the same in their accounts.

In spite of that certificate the defendants proceeded with the

erection of the building; whereupon this action was brought against the school board by three ratepayers, Messrs. Dyer, Tibbitt, and Everard, suing in their individual capacities and also on behalf of themselves and all other the ratepayers of the metropolis assessable to the local rates, claiming a declaration that the defendants could not lawfully expend the rates levied under the Elementary Education Acts, or any part thereof, for the provision of lands or buildings to be used solely as premises in which pupil teachers were to be educated and trained, or for training classes, or for the purpose of carrying on establishments as above described; and could not lawfully use the said rates, or any part thereof, for the purposes of training classes, or of teaching or training pupil teachers otherwise than in a public elementary school and as members of the teaching staff; also an injunction to restrain the defendants from applying any part of the said rates, or the proceeds thereof, contrary to the declaration aforesaid.

From the evidence it appeared that the ages of the pupils in the pupil teachers' centres varied from fourteen to twenty-four years, and that prior to the establishment of these separate centres the pupil teachers used to receive their instruction in the public elementary schools themselves, from the certificated or duly qualified teachers in those schools, who received extra payment for the purpose.

Upon motion by the plaintiffs, Farwell J., on July 25, 1902, made an order restraining the defendants, their officers, contractors, servants, workmen, and agents, until the judgment or further order, from expending any moneys, the produce of the local rates in the metropolis (being the local rate within the meaning of the Elementary Education Act, 1870), in or towards erecting or building, or continuing to erect or build, on the site of The Elms any building to be used for the purposes of a pupil teacher centre, or otherwise.

The defendants now appealed.

Upon the appeal being opened, counsel for the school board withdrew an objection which they had intended to take, that the action could be maintained only by the Attorney-General; and it was arranged by consent that the Court should deal

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with the appeal as if it were an appeal from a judgment at the trial of the action, so that the Court might decide the real question at issue—namely, whether the board had power to expend the rates in the erection of buildings for a pupil teachers' centre.

Jenkins, K.C., and *Llewelyn Davies*, for the defendants, the school board. The system of pupil teachers' centres has been recognised and sanctioned by the Education Department, which has evidently regarded them as covered by the Elementary Education Act, 1870, for "pupil teachers" are expressly recognised by s. 3 of the Act. Again, s. 4 of the Education Board Provisional Order Confirmation (London) Act, 1900, by implication confers on the school board a power to use the property now in question "for the purposes of a pupil teachers' centre."

The school board are empowered, both by the Act of 1870 and by the Code, to employ pupil teachers, and they are bound to keep the schools for pupil teachers, as well as their other schools, efficient. They must, therefore, have power to teach the pupil teachers, and to teach them in the best way. The Act of 1870, s. 97, refers to "the minutes of the Education Department in force for the time being," generally known as "the Code," and in effect the provisions of the Code are imported into the Act.

It is true that neither in the Act of 1870 nor in the Code is any express power given to the school board to acquire land or to erect buildings upon it for the purposes of a pupil teachers' centre. But such a power ought to be inferred. It is ancillary to the work of elementary education which is intrusted to the board. A good teaching staff is essential to good education, and the pupil teachers should, therefore, be well taught. For that purpose a central place for the teaching of pupil teachers is the most economical method. The Act of 1870 contemplates that part of the teaching staff shall or may be pupil teachers; and if there are pupil teachers the Code prescribes the conditions of their employment as such, and the course of instruction they have to pass.

[VAUGHAN WILLIAMS L.J. Can a pupil teachers' centre be termed a "public elementary school," having regard to art. 15 of the Code, which prescribes the subjects for instruction at a public elementary school?]

The subjects taught to pupil teachers are not the true test. The Act of 1870 clearly authorizes the teaching to pupil teachers of that which is not elementary. *Reg.* v. *Cockerton* (1) will, no doubt, be cited against us. Now, we admit that the decision in that case is that the application of the local rates is limited to the establishment and carrying on of public elementary schools; but the point in that case is not that which arises now. In an elementary school the children are taught only elementary subjects. They may be taught those subjects by a pupil teacher, i.e., by a person who is both to give and to receive instruction. That person may receive instruction from a certificated teacher or other qualified teacher approved by the Board of Education. In order to obtain the Government grant for a pupil teacher the Board of Education must be satisfied that the pupil teacher is receiving instruction in certain specified subjects, and for that purpose the managers must enter into an agreement with the pupil teacher in the scheduled form; and paragraph 5 of that form expressly provides for the instruction being given either by a certificated teacher "or other qualified teacher approved by the Board of Education"; which shews that a teacher other than a certificated teacher of an elementary school may be employed for the instruction of a pupil teacher. The pupil teacher is not the less a pupil teacher because he teaches, say, in the morning in the school to which he is attached, and goes elsewhere in the afternoon to be taught, not by the master of the school, but by another certificated teacher. If it is once admitted that pupil teachers may be taught in classes, the notion that each pupil teacher is to be taught by his own certificated teacher is displaced. The school board are bound to provide education for the pupil teachers, and they do not claim the right to teach them anything beyond what is mentioned in Sched. V. to the Code. Being bound to provide that education, it follows that

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they may provide such buildings as are necessary for that purpose.

Upjohn, K.C., Danckwerts, K.C., and *H. Courthope-Munroe*, for the plaintiffs. The question is whether the school board are entitled to make these payments out of the rates. A pupil teacher has been well defined as "one who takes the benefit of such teaching as the school affords, with the additional obligation of teaching those scholars who are less advanced than himself." This agrees with the definition given in clause 34 of the Code. It means that the boy or the girl stands in the double relation of pupil and teacher to the same school. The London School Board wish to depart entirely from this state of things. The persons who are taught at these pupil teachers' centres are not necessarily pupils at any of the schools of the board. The board are really making use of the pupil teachers' centres as training colleges. Persons who are pupil teachers in voluntary schools may and do attend the classes at these centres, and some of those who attend are persons of full age, not children. Moreover, the teachers at these centres are not members of the staff of any public elementary school at all. And the education given at the centres is far in advance of that which is "elementary." The present case is really governed by *Reg.* v. *Cockerton.* (1) The provisions of the Code which have been relied upon are not within the "minutes" contemplated in s. 97 of the Act of 1870.

[They were stopped by the Court.]

Jenkins, K.C., in reply. In *Reg.* v. *Cockerton* (1) the question as to the instruction of pupil teachers was not before the Court, and therefore, although it purports to be a decision that no education except "elementary" can be given in a public elementary school, it should not be taken too literally.

VAUGHAN WILLIAMS L.J. This is, in form, an appeal against an order for an interlocutory injunction granted by Farwell J.; but it has been agreed that we should treat the appeal as being a trial of the real question between the parties,

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so as to obtain as soon as possible a decision as to whether the moneys derived from the rates may be employed in the way mentioned in the order, and which the defendants are, until judgment, restrained from using for those purposes.

Now, to put it shortly, as I understand the argument of Mr. Jenkins, it comes to this: he accepts to the full the decision in the case of *Reg.* v *Cockerton.* (1) He does not deny that the application of the local rates is limited to the establishment and carrying on of public elementary schools; and he does not deny that the education in public elementary schools has to be the education of children in elementary subjects. But he says that the employment of pupil teachers is an employment which is recognised by the Code; that pupil teachers are an adjunct to the staff of teachers in the elementary schools; and that, looking at the Code to ascertain what the instruction intended by the Code to be given to pupil teachers is, one finds that that instruction is certainly of a character which can scarcely be described as elementary education. For the purpose of proving this he refers us to the form of agreement between the school board and a pupil teacher given in Sched. VI. of the Code of 1901, and especially to the 5th clause, which is as follows: [His Lordship read it, and continued:—] Then he turns to Sched. V., and points out that under that, in the later years of the period of pupil teachership, the pupil teacher has to receive education in subjects which cannot be called elementary. It follows from this, he says, that you must regard the instruction given to pupil teachers as being something which is not dealt with in any way by the *Cockerton Case* (1), and which was not in the contemplation of the Court of Appeal when Sir Archibald Smith delivered the judgment of the Court. Then he goes a step further and says that, if these premises are all true, it follows that the school board are entitled to establish a separate school of the character of the pupil teachers' centres for the purpose of giving this education; and that, being empowered to establish such a school, it follows that the board are entitled to build a school for the purpose, as being a mere detail of the

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carrying on of the authorized school and necessary to it. Mr. Jenkins proceeds to say that in this argument he is in no way withdrawing from his admission that the pupil teachers' centre is not a public elementary school, or that the education given is, in substance, not an elementary education, but something substantially different. I hope that I have stated the arguments of Mr. Jenkins and his admissions in the way in which he intended to present them.

Now, speaking for myself, I am not disposed to question the proposition that, in an elementary school, such an education may be given to pupil teachers under the agreement with pupil teachers as cannot properly be described in itself as being merely elementary education. I do not so far dissent from the argument based upon the 5th clause of the agreement, but I see nothing in that agreement to lead me to suppose that that education which is undertaken by the managers to be given to the pupil teacher should not be given in the public elementary school itself, as had been the usual practice; in fact, I gathered from what Mr. Jenkins said that, so far from denying it, he affirmed the practice, saying that where it was done an extra payment was made to the certificated or qualified teacher who, in the school, gave that instruction. But although he makes that admission, he asks us to say that, as a necessary consequence of the agreement the form of which is recognised by the Code for the employment and instruction of pupil teachers —and which, as he says, is not allowed by the Code to be in any way departed from—the school board have the power to establish a separate school for the purpose of giving this instruction to pupil teachers, and to charge the cost of carrying on that separate school, and of the building of that separate school, upon the local rates. I cannot agree with that in the slightest degree. It seems to me that so to hold would be entirely inconsistent with the judgment in the *Cockerton Case*. (1) The judgment in the *Cockerton Case* (1) in substance decides that the only schools which are to be paid for out of the rates, whether in respect of buildings or instruction or anything else, are elementary schools which are devoted to

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the elementary education of children; and it seems to me that whatever instruction may be given in those schools to pupil teachers beyond the mere elementary instruction is a mere accessory of the public elementary schools, and that it is not right to draw an inference from the kind of education to be given to pupil teachers in the public elementary schools that the school board have a right to establish a school for the purpose of giving education that cannot be described as elementary education—a school which it is admitted cannot be properly described as a public elementary education school. The force of what I have been saying is very much increased when you come to consider what is in fact done at a school for pupil teachers. It is a school at which the average age of the scholars ranges between fourteen and twenty-four: it is a school apparently to which scholars may come from, not a limited district, but any part whatsoever from which they choose to come to get their education at the school, an education which is obviously higher education and not an elementary education. It seems to me impossible to say, consistently with the *Cockerton Case* (1), that the Education Act of 1870 authorizes the charging of the rates with the expense of the establishment and conduct of such a school—a school which is not an elementary school, and not intended for the giving of an elementary education.

ROMER L.J. I am also of the opinion that the disallowance in question made by the auditor, Mr. Cockerton, was rightly made. What are the facts established with reference to these pupil teachers' centres? In the first place, they are schools perfectly distinct from the ordinary schools of the school board—distinct not merely in locality but in their nature; they are not public elementary schools at all: they are schools at which the education given is, substantially, higher education, though it also covers the subjects within the elementary Code. The education is given not to persons who are only children; it is in evidence—and there appears to be be no difference on this point—that the ages of the pupils in the pupil teachers' centres

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vary from fourteen years to twenty-four years; and the education given, it is clear, is not even limited to making the pupil teachers fit only for the duties of acting as pupil teachers at the schools of the school board; it is clear on the evidence and on the admitted facts of the case that the education given is of a wider kind, and is not limited to the special purpose I last mentioned. Finally, though I do not think this is so material, the centres are not limited to the pupils connected with the London School Board schools. Those being the facts connected with these pupil teachers' centres, it appears to me that the expenditure in respect of them out of the rates is wholly unauthorized by the Education Acts.

It was said that there was something in the Code which recognised these centres, or sanctioned some expenditure in respect of them. In the first place, all I can say is, that if the Code had attempted to sanction any such expenditure it would, in my opinion, have gone beyond its due authority. The authority vested in the Board of Education, which established the Code, could not have extended the provisions of the Education Acts to sanction such an expenditure; but, as a matter of fact, when the Code is looked at, it is clear it does not attempt to do any such thing. It very properly makes no provision with regard to these pupil teachers' centres; it does not insist in any way upon their establishment, or refer in any way to any expenditure upon them. That being so, I feel no doubt whatever that the school board have no power to apply the rates for the purposes of these centres.

There is one argument which I ought perhaps to notice, and which was founded on the special provision in the Confirmation Act of 1900. What happened with regard to that was this: the school board apparently wanted to obtain compulsory powers to purchase some sites, and amongst others a site on which they intended apparently to erect a pupil teachers' centre, and they obtained a provisional order enabling them to do so. But that provisional order simply recited that the School Board for London required to purchase divers pieces of land for the purposes of the Elementary Education Acts, 1870 and 1873, and on that footing the board asked for compulsory

powers to purchase amongst other sites the site in question. Now, that had to be sanctioned by an Act of Parliament, and it was so sanctioned.

I gather that before Parliament the owner of the site in question insisted, as a special term, upon some provision being inserted for his own benefit with regard to his property which was being taken, and the surrounding property, and amongst the provisions inserted for his benefit I find a provision that, if the school board did purchase the site in question, the site should not for a period of fifty years be used by the School Board for London "otherwise than for the purposes of a pupil teachers' centre." It is said that the insertion of those words, "otherwise than for the purposes of a pupil teacher centre," gives a legislative sanction to what the school board are doing with regard to these centres. In my opinion it does nothing of the kind. That Act was not concerning itself with any question as to the expenditure of the rates upon a valid or an invalid purpose at all; it was a provision inserted, as I have pointed out, for the protection of the owner of the site.

To my mind, it would be an extraordinary thing to suppose that such a provision as that was inserted for the purpose of extending the provisions of the Elementary Education Acts and sanctioning that which, up to that time, was unlawful. It had an entirely different object. The Legislature was not considering or dealing with any such question as we have here; it was considering simply the question of the user of land as between the owner of the land and the school board. In my opinion, it cannot be said that an Act like this was intended to sanction what was otherwise illegal under the provisions of the existing Acts and Codes. That being so, that argument also appears to me to fail; and it therefore follows that this appeal must fail, and with the usual result.

MATHEW L.J. I am of the same opinion. I am satisfied that the school board cannot establish these pupil teachers' centres without further statutory powers. Those powers do not appear to me to be conferred either by the Code to which reference has been made, or by the Act of 1900 to which

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Romer L.J. has just referred. We have to start with the Act of 1870, the object of which is perfectly clear: it provides for elementary education in the schools established by the school board. There is a provision in the Act for a certain purpose, namely, the teaching of pupil teachers, and something more than the ordinary elementary education appears to be contemplated, because these pupil teachers have to be taught the art of teaching, and in that respect their position is different from that of the other scholars in the schools. Beyond that the school board have no power to go. What they are attempting to do is to establish what it is not at all extravagant to describe as independent colleges for the tuition of pupil teachers. The justification for the assertion that this may be done is sought in the form of agreement which has been referred to, and it has been suggested that the object of such an agreement is to enable the school board to do what they have been attempting to do in the establishment of these pupil teachers' centres. It is possible to construe every word of clause 5 of the agreement as being within the statutory powers of the school board. There is very great caution, it appears to me, in the language used, so as not to indicate any intention of going beyond what were understood, at the time it was framed, to be the powers of the school board. Instruction is to be given in the elementary schools to pupil teachers, who are afterwards to act as certificated teachers, supposing their education in that respect is sufficient. The clause is drawn very carefully: "The school board shall cause the pupil teacher to receive without charge, from a certificated teacher, or other qualified teacher"—that does not indicate any intention to create a separate institution —"approved by the Board of Education, special instruction, including practical instruction in teaching." "Special instruction"—again it is guarded phraseology explained by the words which follow—"including practical instruction in teaching." Then it goes on to say: "Such special instruction, and any instruction in secular subjects given to the pupil teacher during school hours, shall be in the subjects in which the pupil teacher is to be examined during this engagement." A concession is made in that respect, and the certificated teacher may for the

purpose indicated go beyond what is elementary. There is no power to create an institution in order that the pupil teachers shall there receive special instruction to enable them afterwards to become certificated teachers.

Then with reference to the Act of 1900, it was not intended by the Act to alter the Act of 1870: nothing is clearer than that. Therefore the arguments of the appellants with reference to the Code and the statute appear to me to fail, and I agree in the judgment that has been pronounced by my learned brethren.

VAUGHAN WILLIAMS L.J. There will be a declaration that the disallowance by the auditor was rightly made; and a perpetual injunction restraining the defendants from making any payment for the building of any school other than a public elementary school out of the school board fund; and the defendants must pay the costs of the action.

[An application on behalf of the defendants that the injunction might be suspended pending an appeal to the House of Lords was refused.]

Solicitors: *C. E. Mortimer; F. A. Baker.*

G. I. F. C.

C. A.
1902
Aug. 11.

CHURCH'S TRUSTEE *v.* HIBBARD.

[1901 C. 3846.]

Debtor—Order for Payment of Money—Default—Contempt—Attachment—Imprisonment—Release from Prison—Mistake—Second Order for Attachment—Rearrest—"One Year's" Imprisonment—Including Period of Liberty—Jurisdiction—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

An order for attachment made under s. 4 of the Debtors Act, 1869—which preserves imprisonment for debt in the six cases of default there specified—is not in the nature of a remedy for the recovery of a debt, but is in the nature of a punishment—that is, punishment for an offence; and a second punishment cannot be awarded for the same offence.

Therefore where a debtor had been imprisoned under an order made for his attachment for default in payment of a sum of money which he had been ordered to pay (sub-s. 3), but was by mistake released before the expiration of the one year limited for imprisonment by the section:—

Held, by the Court of Appeal, reversing the order of Swinfen Eady J., that there was no jurisdiction to make a second order for attachment for the same default; though, *semble*, an order for rearrest might have been made under the original order for attachment.

Per Mathew L.J.: In case of an order for rearrest, the period of imprisonment must end with the twelve months from the date of the original imprisonment, inclusive of the time the debtor had been at liberty.

THIS was an action by the trustee in bankruptcy of Charles Alfred Church, who had been adjudicated bankrupt, against Montague Hibbard & Co., a firm of auctioneers, for an account of all moneys received by them in respect of goods, the property of the bankrupt, sold by them on October 28 and 29, 1901, by auction upon the instructions of the plaintiff as such trustee; and for payment by the defendants to the plaintiff of what should be found due upon the taking of the account.

On December 6, 1901, Swinfen Eady J. ordered the defendant firm to pay to the plaintiff by a certain day the sum of 1200*l.* admitted by them to be in their hands as his agents in respect of property of the bankrupt sold by them. 425*l.* of that sum was subsequently paid, but default having been made in payment of the remainder, 775*l.*, the learned judge, on

February 12, 1902, upon motion by the plaintiff, made an order which, after stating that it had appeared to the satisfaction of the Court that the default was a default made by a trustee or person acting in a fiduciary capacity and ordered to pay a sum in his possession or under his control within the meaning of the Debtors Act, 1869, gave the plaintiff leave to issue a writ or writs of attachment against Montague Hibbard and Harold Vickers, the partners in the defendant firm—both of whom had appeared to the action individually in their own names—for their contempt in not having paid the 775*l.* to the plaintiff pursuant to the order of December 6, 1901.

In pursuance of that order of February 12, 1902, a writ of attachment was, on February 25, 1902, issued against Hibbard, and another against Vickers.

On the same day Hibbard was arrested by the sheriff and lodged in Holloway Prison under a writ of attachment issued against him and Vickers in pursuance of an order made on February 7, 1902, by Byrne J. for contempt in not having complied with an order for delivery of accounts in another action. On the following day, February 26, the sheriff lodged a warrant or detainer against Hibbard with the governor of the prison under Swinfen Eady J.'s writ of attachment in the present action, and made his return accordingly.

Subsequently Vickers was also arrested and lodged in Holloway Prison.

On March 15, 1902, an order was made by Byrne J. in the other action for the discharge from custody of Hibbard and Vickers so far as concerned their contempt in that action.

Three days afterwards, on March 18, Swinfen Eady J. made an order in the present action for the discharge from custody of Vickers alone so far as concerned his contempt of the order of December 6, 1901, upon a payment being made on his behalf by a relative of 450*l.* to the plaintiff, the Court being satisfied that Vickers was himself wholly unable to pay any part of the original 1200*l.*

Upon the same day, March 18, on the receipt of those two orders, that by Byrne J. of March 15, and that by Swinfen Eady J. of March 18, the governor of Holloway Prison,

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misapprehending the effect of those orders, released both Hibbard and Vickers.

The plaintiff then moved for leave to issue a writ of attachment against Hibbard alone for his contempt in not having complied with the order of December 6, 1901; or, in the alternative, for directions that the plaintiff might, pursuant to the order of February 12, 1902, be at liberty to issue a further writ of attachment against Hibbard for his contempt mentioned in that order, notwithstanding the issue of the previous writ of attachment under that order, the lodging of the warrant on February 26, 1902, with the governor of the prison who had him in his custody, and his subsequent escape or release from prison.

That motion was heard by Swinfen Eady J. on July 29, 1902, when his Lordship made the following order: after reciting the order of February 12, 1902, it proceeded:—

"This Court doth order that the plaintiff be at liberty to issue a further writ or writs of attachment against the said Montague Hibbard in respect of his contempt in the said order dated the 12th February, 1902, mentioned, but that the writ or writs to issue under this order shall not authorize the imprisonment of the said Montague Hibbard for any longer period than such time as, with the period from the 26th February, 1902, to the 18th March, 1902 (being the time during which the said Montague Hibbard was imprisoned under a writ of attachment issued on the 25th February, 1902, pursuant to the said order dated 12th February, 1902), shall together amount to one year, and notice to this effect is to be put in such writ or writs of attachment."

Hibbard appealed.

The appeal was heard on August 11, 1902.

The main question was whether, under the exceptions contained in s. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) (1),

(1) Sect. 4 in Part I. of the Act, under the heading "Abolition of Imprisonment for Debt," is as follows:—

"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment:

"1. Default in payment of a penalty, or sum in the nature of a penalty,

the Court had jurisdiction to order the issue of a second writ of attachment for the same contempt or default.

Bray, K.C., and *Eustace Smith*, for the defendant Hibbard. This order is irregular on two grounds: first, because the order of February 12, 1902, is still in force, and, therefore, the learned judge had no jurisdiction to make any further order in the matter at all, except for the release of the debtor; and, secondly, because it directs imprisonment for twelve months—the longest period allowed by s. 4 of the Debtors Act, 1869—without taking into account the time during which the debtor had been at liberty: the twelve months should run from the date of the commencement of the imprisonment.

With regard to the first and main ground of irregularity, s. 4 of the Act is penal: punishment is intended for each of the offences, that is, the defaults, mentioned in the section. When the penalty has once been inflicted by sentence of imprisonment, the jurisdiction of the Court is gone, and there is no power to inflict a second sentence for the same offence: *Horsnail* v. *Bruce*. (1) Whether the debtor can be sent back to prison under the original order for attachment is not the question now before the Court.

other than a penalty in respect of any contract:

"2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:

"3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control:

"4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order:

"5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order:

"6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:

"Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."

(1) (1873) L. R. 8 C. P. 378.

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Micklem, K.C., and *Edward Clayton*, for the plaintiff. There is no good reason why a second order for attachment against a debtor should not be made if necessary. Contempt of Court is not an "offence" in the sense of being a crime under the criminal law; and, therefore, the rule that a second punishment cannot be awarded in such a case does not apply. The object of an order for attachment of a debtor is to get from him the money he owes: it is one of the most valuable remedies the creditor has.

[VAUGHAN WILLIAMS L.J. Default in payment under an order of the Court is a delinquency for which the Act intends punishment: *Middleton* v. *Chichester*. (1) It is, therefore, an "offence," for which the Court can only punish once.]

The policy of the Act is to provide means for enforcing obedience to an order of the Court; attachment under an order is a mere civil, not a criminal, process for enforcing obedience to the order of a civil Court: *Pooley* v. *Whetham*. (2) Committal for contempt is, therefore, a civil remedy, though limited by the Act, the Court allowing the writ of attachment to go for the protection of the creditor.

The release of the debtor here was a mere slip on the part of the governor of the prison: it was not a "negligent escape," but a "voluntary escape" by the debtor, and, therefore, the sheriff has no power to retake him, though the plaintiff can, under s. 7 of 8 & 9 Will. 3, c. 27: *Filewood* v. *Clement*. (3) The Court has now, under the Debtors Act, 1878 (41 & 42 Vict. c. 54), a discretion, in any case falling within the exceptions in s. 4 of the Act of 1869, as to granting or refusing an application for a writ of attachment. The Act of 1869 is intended to meet the case of a fraudulent or dishonest debtor: *Marris* v. *Ingram*. (4) This case is really covered by 8 & 9 Will. 3, c. 27, s. 7, under which an escaped prisoner may be rearrested upon a new writ of ca. sa.

[VAUGHAN WILLIAMS L.J. *In re Smith* (5) shews that s. 4 of the Act of 1869 is "punitive."]

(1) (1871) L. R. 6 Ch. 152.
(2) (1880) 15 Ch. D. 435, 440.
(3) (1838) 6 Dowl. 508.
(4) (1879) 13 Ch. D. 338.
(5) [1893] 2 Ch. 1, 17.

Still, the remedy given by the section is a creditor's remedy, and is designed for procuring payment of his debt: he is entitled to pursue his remedy and get the debtor locked up under the Act of William III., which is still in force. The Court of Equity will, until the debtor has purged his contempt, take care that he shall remain in prison, and, we submit, may issue any number of writs for that purpose. Under the old practice of ca. sa., an application for rearrest might be made either for an order under the old writ or for a new writ: so that, if the application in the present case had been under the old practice, it would have been right in form. The modern writ of attachment is merely the Chancery form of the old King's Bench writ of ca. sa.

VAUGHAN WILLIAMS L.J. (after reading the order appealed from). The question which we have to determine is whether or not this order was one which the learned judge had jurisdiction to make, having regard to the provisions of the Debtors Act, 1869.

I desire at once to say that we have not to-day to decide in any way whether the creditor here has any right to ask that the debtor be sent back again to prison to endure the punishment which was awarded to him under the original writ of attachment of February 25, 1902. It may very well be that upon a proper application an order might be made by the Court by which the debtor might be sent back to serve the residue of his imprisonment. Moreover, I do not at the present moment express any opinion whether the residue of that imprisonment, which we know cannot continue for more than the term of one year, would expire in one year from February 26, 1902, the date of the commencement of the imprisonment under the original writ of attachment, or whether it would not. The only question to which I propose to address myself is whether or not the order now appealed from is an order which the Court had jurisdiction to make.

Now, in order to arrive at a conclusion upon this point, one must look at the Debtors Act, 1869. The 4th section runs as follows: [His Lordship read the section, and continued:—]

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Now, it was pointed out a long time ago by Lord Hatherley, in *Middleton* v. *Chichester* (1), that in the case of every one of these exceptions "there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference, with reference to the question of delinquency, whether a person has the money in his possession." As Lord Hatherley says, in the case of all these exceptions from the abolition of imprisonment for debt, what the Legislature did was to except those cases in which a debtor deserved to be punished. To use the very words of Lord Hatherley (2), the exceptions were intended by the Legislature to relate to "debts the incurring of which was in some degree worthy of being visited with punishment."

Then, in *Marris* v. *Ingram* (3), Jessel M.R. took the same view. He says (4): "I wish to say one or two words about the view that I take of the law, because I do not think that the Debtors Act, 1869—which, though it abolished imprisonment for debt in certain cases, was, as it in fact says in so many words, legislation 'for the punishment of fraudulent debtors'—did not mean punishment. Now when we come to look at the Act, we find that it contains different provisions to meet different classes of debtors, there being one set of provisions in the case of defaulting debtors of a certain class, and special provisions being made in the case of debtors guilty of misdemeanour or other misconduct; and, looking at these provisions, it is impossible to suppose that punishment for misconduct was not intended to be meted out. That it was contemplated by the Act is clear, because the 4th section, which abolished punishment for debt by imprisonment where a man could not pay, contains the following exceptions": then he reads the first three exceptions, and as to the third, namely, default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control, he says: "Why is such a person as the last excepted? Simply because he is a dishonest man. He need not perhaps be called a thief in so many

(1) L. R. 6 Ch. 152, 157.
(2) Ibid. 156.
(3) 13 Ch. D. 338.
(4) Ibid. 341.

words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such."

That view of the Act is confirmed by the judgment of Lindley L.J. in *In re Smith.* (1) After remarking that Mellish L.J. had taken a different view at one time, Lindley L.J. says this (2): "The punitive character of s. 4 of the Debtors Act, 1869, which was pointed out in *Middleton* v. *Chichester* (3), has been since so often recognised that it cannot now be questioned: see *Marris* v. *Ingram* (4); *In re Gent.*" (5) And it is to be noted, as giving emphasis to the authorities, that in most of them the application had relation to the discharge of a debtor from prison, or to his non-liability to be imprisoned, in cases where he had been adjudged bankrupt. The decisions were that he was not entitled to freedom or to be discharged inasmuch as, although the Bankruptcy Act, 1883, does, under certain circumstances, by s. 9 relieve the debtor from every remedy against his person or property, it does not relieve him from the stringency of these orders under s. 4 of the Debtors Act, since these orders are not in the nature of remedies for the recovery of debts but are in the nature of punishment.

Now, having regard to these authorities, in my judgment you can only punish for fraudulent offences of this sort once: you cannot punish twice in respect of the same offence, or give two sentences in respect of the same offence. I say nothing about what you might or might not do in some cases of continued offences. Here, upon the face of this order, it is made perfectly clear that the offence for which the debtor is being attached is the identical offence for which he was punished under the first order, for the second order says so in terms; and according to my view of the Act—a view which is entirely in accordance with the decision in *Horsnail* v. *Bruce* (6)—there cannot be a second writ of attachment issued in respect of the same offence.

In my judgment, therefore, this order is not an order which

(1) [1893] 2 Ch. 1.
(2) Ibid. 17.
(3) L. R. 6 Ch. 152, 157.
(4) 13 Ch. D. 338.
(5) (1888) 40 Ch. D. 190.
(6) L. R. 8 C. P. 378.

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ought to have been made. As I said before, I am very far indeed from saying that such an order might not be made as would cause this debtor to serve the residue of his punishment; but, in my opinion, in these matters of the liberty of the subject, it is essential that the form should be strictly followed; and although it may very well be that the debtor under this writ would be no worse off than if he had simply been rearrested under the old writ, I do not think the fact that his position would be substantially the same would justify us in supporting this order of Swinfen Eady J. if it is—as we think it is—an order which is not justified under the Debtors Act, 1869.

MATHEW L.J. I am of the same opinion, but I have arrived at that conclusion not without considerable reluctance, because the question here is practically one of mere form.

The debtor in this case has not atoned for his offence to the Court by enduring the imprisonment which was ordered to be inflicted upon him; and it has scarcely been disputed that if another mode were taken for continuing his imprisonment the desired result might be arrived at; but I agree with my Lord that, before we hold that writs of attachment can issue in succession, we should see that the Act of Parliament permits that to be done. Now, nothing is clearer to my mind than that the Act only contemplates one writ of attachment; any other conclusion would lead to this, that a judge or Court might issue an attachment and order imprisonment, in the first instance say for six months, and then, if that were not found to be effective, might issue another attachment for another six months; and that is a thing which the Act does not justify.

With reference to the position of the delinquent in question, it does not appear to me to be open to much doubt—although I am not called upon now to pronounce an opinion upon it—that the learned judge would have the power to order a rearrest under his original order for a writ of attachment, inasmuch as the debtor has not undergone his punishment for the offence offered to the Court. I am further of opinion that, if any such order should be made, the period of imprison-

ment should end with the twelve months from the date of the original imprisonment, and that the order now in question is irregular on the ground that it seeks to make out twelve months, disallowing the period of time during which the debtor was at liberty.

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I agree that the appeal must be allowed.

VAUGHAN WILLIAMS L.J. The appeal is allowed, but without costs.

Solicitors: *Dyson, Smith & Marchant; Edward Lee, Davis & Lee.*

G. I. F. C.

In re HUXTABLE. HUXTABLE *v.* CRAWFURD.

C. A. 1902 *Oct.* 27.

[1901 H. 2089.]

Will—Construction—Charitable Legacy—Limited Charitable Purpose—Bequest "for the Charitable Purposes agreed upon between" the Testatrix and the Legatee—Evidence—Admissibility.

A testatrix bequeathed 4000*l.* to C. "for the charitable purposes agreed upon between us":—

Held, that this was a gift for limited charitable purposes, and that evidence was admissible to shew what the purposes agreed upon were.

Decision of Farwell J., [1902] 1 Ch. 214, on this point, affirmed.

But *held*, that, the gift on the face of the will being of the capital of 4000*l.*, evidence was not admissible to contradict the will by shewing that the agreement between the testatrix and the legatee was that only the income of the 4000*l.* during his life should be devoted to the charitable purposes.

Decision of Farwell J. on this point reversed.

The Court directed that a scheme should be settled.

APPEAL from the decision of Farwell J. (1)

Susannah M. Huxtable, who died in March, 1901, by her will dated August 7, 1899, bequeathed the sum of 4000*l.* to the defendant Crawfurd "for the charitable purposes agreed upon between us."

Crawfurd made an affidavit in which he stated that he and

(1) [1902] 1 Ch. 214.

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the testatrix had been on terms of intimate friendship for many years, and that about the year 1891 she verbally informed him of her intention to leave him a sum of 4000*l.*, the income of which he was, in the exercise of his discretion, to apply during his life for the relief of sick and necessitous persons being members of the Church of England, and also towards the support of charities connected with the Church of England, and that he was to dispose of the principal after his death as his own property; that on subsequent occasions she had declined to give him more specific directions about the income, stating that she was unwilling to fetter his discretion in the matter; and that at no time had she indicated any intention that the principal of the fund should be applied for charitable purposes.

Upon a summons taken out by the executors, Crawfurd not claiming any beneficial interest in the 4000*l.*, Farwell J. held that the gift was for limited, not general, charitable purposes, and that evidence was admissible to shew what those purposes were. And upon the evidence he held that there was a good bequest to the charitable purposes of the income of the 4000*l.* during the life of Crawfurd, and that on his death the corpus would fall into the residue of the estate.

The Attorney-General appealed.

Sir R. B. Finlay, *A.-G.*, and *R. J. Parker*, for the appellant. It is submitted that the whole 4000*l.*—not merely a life interest in it—is given by the will for the charitable purposes mentioned in it and defined by the affidavit of the defendant Crawfurd. At any rate, the whole fund is given for charitable purposes generally.

[They were stopped by the Court.]

Butcher, *K.C.*, and *Christopher James*, for the next of kin of the testatrix. The gift is for a limited charitable purpose, and evidence is admissible to shew what that purpose was. The affidavit, if admitted, must be taken as a whole. It shews what the intention of the testatrix was, and it is not inconsistent with the will. The intention was to give only a life interest to the charitable purposes agreed upon.

There is no gift for general charitable purposes: *Attorney-General* v. *Syderfen* (1); *In re White* (2); *In re Rymer*. (3) When the Court holds that there is a general charitable intent, the object is to effectuate the intention of the testator; to do so here would be to frustrate the intention which the testatrix has declared. Either the income of the fund must be applied as the testatrix intended for the limited charitable purposes, or the gift must fail.

Ashworth James, for the defendant Crawfurd, stated that he made no claim to a beneficial interest in the 4000*l*., but submitted that he had a discretion as to the mode of application of the fund.

Errington, for the executors.

VAUGHAN WILLIAMS L.J. I regret to say that I cannot agree with the conclusion at which Farwell J. has arrived. [His Lordship read the above-stated clause in the will, and continued:—] I cannot doubt that the affidavit of Mr. Crawfurd is admissible in evidence, but it is admissible only for the purpose of proving matters which are not defined by the will. Evidence is admissible to shew what were in fact the charitable purposes agreed upon between the testatrix and Mr. Crawfurd, but not to shew what was the amount of the legacy. That is a matter which, to my mind, is disposed of by the plain words of the will. Then when we look at the affidavit, and ask what were the charitable purposes which were agreed upon between the testatrix and Mr. Crawfurd, those purposes are perfectly plainly defined. They were primarily "for the relief of sick and necessitous persons being members of the Church of England, and also towards the support of charities connected with the Church of England." To that extent the affidavit is admissible and does define the purposes. But the affidavit goes on to deal with other matters which are plainly dealt with in the will by the testatrix herself, and, to my mind, to contradict her will in a very plain way. By the will the amount left for these charitable purposes was a sum of 4000*l*. There

(1) (1683) 1 Vern. 224. (2) [1893] 2 Ch. 41.
(3) [1895] 1 Ch. 19.

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is not a word in the will about the subject-matter of the gift being only the income of the 4000*l.* But in his affidavit Mr. Crawfurd, after stating the will, says, "a sum of 4000*l.*, the income of which I was to apply during my life"; and then he goes on to say, "I was to dispose of the principal after my death as my own private property." It appears to me that the effect of that statement is plainly to contradict the will of the testatrix. He substitutes for the 4000*l.*, which was the subject-matter of her legacy, the income of that sum. Therefore, when I find in the judgment of Farwell J. (1) these words, "I do not see that there is any contradiction of the will in saying that 'the charitable purpose agreed upon' exhausted the whole income of the fund, but lasted only for a limited time and did not go on for ever," it seems to me that in so saying he contradicts the words of the will by which the subject-matter of the legacy for these purposes is defined as 4000*l.*, and not merely the income of 4000*l.*

Now, a good deal has been said about the question whether a general charitable purpose is indicated in this will. I do not propose to say anything upon that subject, and for this reason—that in the will, supplemented by so much of the evidence of Mr. Crawfurd as defines the purpose, a limited charitable purpose is plainly defined, which charitable purpose so defined, in the absence of something in the will to the contrary, is one which would go on for ever; and if there should be any difficulty as to the mode of the application of the money, I think there is an amply sufficient definition of the charitable purposes agreed upon to enable the Court to direct that those purposes shall be carried out, notwithstanding any deficiencies in the statement of the mode of application.

In my opinion, the decision of Farwell J. must be reversed, and an order should be made for the settlement of a scheme, not limited to the income of the 4000*l.*, but dealing with the whole of the capital.

STIRLING L.J. I am of the same opinion, and I have really nothing to add. In fact, I should say nothing were it not

(1) [1902] 1 Ch. 216.

for the most unfeigned respect I feel for any judgment of Farwell J., from whom on this occasion I am constrained to differ. Now, if there is anything plain on the face of this will, it is, I think, this—that the subject-matter of this legacy was 4000*l.*, and not any limited interest in 4000*l.* The whole of the sum of 4000*l.* was to be devoted to the charitable purposes referred to, whatever they might be. In the face of that, Farwell J. has made an order by which he has held that the fund applicable for the charitable purposes is only the income of the 4000*l.* during the life of Mr. Crawfurd. I confess I am unable to see how that is consistent with the will. Mr. Crawfurd has made an affidavit (to the admission of which I understand the Attorney-General makes no objection) in which he says that conversations took place between the testatrix and himself with reference to a legacy of 4000*l.* which she said she was going to leave him, and that he was to apply the income of that 4000*l.* during his own life for certain charitable purposes which he specifies, and at his death he was to be at liberty to dispose of it as his own property. In my opinion, that affidavit is admissible only for the purpose of ascertaining what are the charitable purposes which are referred to in the will, and no further. The fact that those charitable purposes were to continue only during the lifetime of Mr. Crawfurd, and that on his death the fund was to cease to be a charitable fund, is entirely irrelevant to the purpose for which this evidence is admissible. If, for instance, the affidavit had stated that a conversation had taken place with reference to a legacy of 2000*l.*, and that by her will the testatrix had bequeathed 4000*l.* for the charitable purposes, it could never, as it seems to me, be contended that the amount of the legacy was to be cut down and that the charities were to have only 2000*l.*, because the conversation related to 2000*l.*, whereas by her will the testatrix expressly said that 4000*l.* was to be applied to the charitable purposes. In like manner it appears to me that, when the will says that the capital sum of 4000*l.* is to be applied to the charitable purposes, it is not competent for the Court to look at the evidence for the purpose of cutting down the gift to the income of 4000*l.*

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during the life of Mr. Crawfurd. For these reasons I entirely agree with what has been said by my Lord, and I think that the appeal ought to be allowed.

COZENS-HARDY L.J. I agree. It seems to me that the will fixes absolutely the subject-matter of the gift, namely, 4000*l.*, and that Mr. Crawfurd's affidavit may be referred to for one purpose only, namely, to ascertain what are the charitable purposes agreed upon. And, looking at that affidavit, those charitable purposes are clearly defined. I think, therefore, that the order must be reversed so far as it is complained of. I do not know whether the Attorney-General would object to a declaration that the 4000*l.* is held upon the charitable trusts mentioned in paragraph 3 of the affidavit.

R. J. Parker. I would suggest that the words "corpus and income" should be inserted after 4000*l.*

THE COURT assented.

THE COURT directed that a scheme should be settled in chambers.

Solicitors: *Solicitor to the Treasury; Clutton & Johnson; Waltons, Johnson, Bubb & Co.; Bridges, Sawtell & Co.*

W. L. C.

In re LAWLEY. ZAISER *v.* LAWLEY.

C. A. 1902 Oct. 29, 30.

[1901 L. 2654.]

Power of Appointment—General Testamentary Power—Exercise—Covenant to exercise Power by way of Security for Loan—Liability of Appointed Fund for Debts.

The donee of a general testamentary power of appointment over a fund borrowed a sum of money and, as security for the loan, covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund, and that he would not revoke the will. He made a will accordingly, and died:—

Held, that the covenant was ineffectual to bind the fund, and that, notwithstanding that the will was made in pursuance of the covenant, the lender was a volunteer as against the testator's general creditors, and therefore took subject to the rule that the exercise by will of a general power of appointment makes the property which is the subject of the power assets for the payment of the debts of the appointor; consequently, that he was not entitled to priority as regards the fund over the other creditors.

Decision of Joyce J. affirmed.

In re Newnham's Estate, W. N. (1881) 69, distinguished.

APPEAL from a decision of Joyce J. (1)

The Hon. Francis Charles Lawley, under the will of his mother Lady Wenlock, had a general power to appoint by will a sum of 10,000*l.*, which in default of appointment was to go as part of her residuary estate. On April 7, 1892, he executed a mortgage in favour of Mr. G. F. Perkins to secure a loan of 1000*l.* with interest thereon at 8 per cent. By this mortgage he covenanted that he would immediately after the execution thereof sign his will, which was already prepared, bearing even date therewith, whereby, in exercise of his testamentary power of appointment under the will of his late mother he appointed that the trustees of her will should stand possessed of the sum of 10,000*l.* and the investments representing the same, upon trust to pay to the mortgagee thereout,

(1) Ante, p. 673.

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in preference and priority to all other payments, the said sum of 1000*l.* and all interest thereon, and that he would not revoke or alter his will without the consent in writing of the mortgagee. On the same day he executed his will containing the above provisions, and stating that it was his wish that the loan should be a first charge on the 10,000*l.*, and he died on September 18, 1901, without having altered or revoked his will save by certain codicils changing the names of his executors. Mr. Perkins was also dead. Shortly after Mr. Lawley's death the trustees of Lady Wenlock's will paid into court to the credit of this action—which was a creditor's action for the administration of Mr. Lawley's estate—certain bonds of the nominal value of 3200*l.*, representing a part of the 10,000*l.* over which Mr. Lawley had his testamentary power of appointment. The whole of the principal sum of 1000*l.*, together with arrears of interest, was still due under the mortgage of April 7, 1892. The question having arisen whether the estate of Mr. Perkins was by virtue of this mortgage entitled to priority over the general body of Mr. Lawley's creditors, Mr. Perkins' executors took out a summons in the administration action against Mr. Lawley's executors, asking for payment out of the fund in court of the sum due to them upon their security, or, in the alternative, that they might be admitted as creditors of the estate.

Joyce J. held that the applicants were not entitled to priority as regards the fund over the general creditors.

The applicants appealed.

Badcock, *K.C.*, and *E. Ford* for the applicants. If a man having a general testamentary power of appointment over a fund appoints it to a volunteer, his creditors can upset the appointment; but in this case the right to use the appointment has been pro tanto sold to us. It is true that we could not have enforced the covenant by specific performance, and could not have restrained the appointor from revoking his will when made. We took the risk of that; but, the will having been made and not having been revoked, no objection can be raised to the appointment: Sugden on Powers, 8th ed. p. 214.

[VAUGHAN WILLIAMS L.J. Does Lord St. Leonards cite any authority for that proposition?]

He cites only *Reid* v. *Shergold* (1), which goes merely to the question of revocation; but we rely upon the language of Jessel M.R. in *Robinson* v. *Ommanney* (2) as supporting that view; and see *George* v. *Milbanke.* (3)

[VAUGHAN WILLIAMS L.J. That was a case of appointment by deed, and it turned upon 13 Eliz. c. 5.]

The rule under which the creditors claim this fund is limited to appointments made in favour of volunteers: *In re Roper* (4); and it is so stated in Farwell on Powers, 2nd ed. p. 254. It proceeds upon the analogy of 13 Eliz. c. 5, and it is intended to prevent a man from benefiting his family at the expense of his creditors; it is based upon the principle that a man must be just before he is generous: *Bainton* v. *Ward* (5); *Lord Townshend* v. *Windham* (6); *In re Harvey's Estate.* (7) It has nothing to do with priorities between the creditors inter se.

[STIRLING L.J. Suppose the donee of a general power has creditors A., B., and C., can he appoint by will that A. shall be paid in priority to B., and B. in priority to C.?]

There might be a difficulty about that unless value had been given for the priority; but we have paid for the preference which the appointor has given to us. In considering the meaning of the word "volunteer" in connection with this rule, Kindersley V.-C. thought that the test was whether the appointor was under any obligation to the appointee to appoint to him: *Vaughan* v. *Vanderstegen* (8); and although the decision in that case has not been approved of in subsequent cases, this view has not been questioned. Applying that test to the present case, we say that the appointor was under an obligation to us, and not the less so because it was an obligation which the Court will not enforce by specific performance, as was held in *In re Parkin* (9), for it is well settled that if the

(1) (1805) 10 Ves. 370.
(2) (1883) 23 Ch. D. 285, 287.
(3) (1803) 9 Ves. 190; 7 R. R. 157.
(4) (1888) 39 Ch. D. 482, 487.
(5) (1741) 2 Atk. 172.
(6) (1750) 2 Ves. Sen. 1.
(7) (1879) 13 Ch. D. 216, 222.
(8) (1853) 2 Drew. 165, 178.
(9) [1892] 3 Ch. 510.

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appointor had failed to perform his covenant damages might have been recovered against him for the breach of it. That appears from *In re Parkin* (1) itself. But, further, an agreement to leave real estate by will may be enforced against a person to whom the land has been left in breach of the agreement: *Goylmer* v. *Paddiston.* (2) Therefore it is only from the nature of the subject-matter that we could not have specific performance in this case. If the view of the respondents prevails this strange result follows—that if the appointor had broken his covenant we might have recovered damages for the breach, but he having performed his covenant we can get nothing.

The appointor has had the benefit of our 1000*l.*, and his estate ought not to get it over again. *In re Newnham's Estate* (3), which is the only reported case in which the claim of the general creditors was against appointees who were not volunteers, is a direct authority in our favour.

Hughes, K.C., and *Wace*, for the respondents. The rule that the exercise by will of a general power of appointment makes the property which is the subject of the power assets for the payment of the appointor's debts is not confined to appointments made in favour of volunteers. Though the rule is so stated by Farwell J., the word "volunteer" is not mentioned in any of the cases which he cites in support of the rule, namely, *Fleming* v. *Buchanan* (4); *Jenney* v. *Andrews* (5); *Williams* v. *Lomas.* (6) But, assuming that the rule applies only to volunteers, these applicants are volunteers as against the general creditors. The appointor could not be compelled to make the will, and could not be restrained from revoking. This is nothing but a legacy, though a legacy, no doubt, to a person to whom the appointor is under an obligation. We say that a person taking under a testamentary appointment, although that appointment is made in pursuance of an obligation, is a volunteer. The actual fact

(1) [1892] 3 Ch. 510.

(2) (1681) 2 Vent. 353; reported also sub nom. *Goilmere* v. *Battison*, 1 Vern. 48.

(3) W. N. (1881) 69.

(4) (1853) 3 D. M. & G. 976, 980.

(5) (1822) 6 Madd. 264; 23 R. R. 216.

(6) (1852) 16 Beav. 1.

of appointing makes the fund assets of the appointor from his death, and it is impossible to get a specific charge upon the fund before that time. A covenant to exercise a power by will is not enforceable whatever the nature of the property: *Reid* v. *Shergold* (1); *In re Parkin.* (2) *In re Newnham's Estate* (3) is distinguishable.

Badcock, K.C., in reply.

VAUGHAN WILLIAMS L.J. I think that the judgment of Joyce J. is right and must be affirmed. [His Lordship stated the facts, and continued:—]

The question which we have to decide is whether the applicants, who are the legal personal representatives of the lender, have as against the appointed fund any charge or any priority over the other creditors. There can be no doubt but that both real and personal estate subject to general powers of appointment become assets for the payment of the appointor's debts, if the power is exercised by will in favour of volunteers.

The power must, of course, be exercised; but, provided the power is exercised, the estate becomes assets. It is said, however, that this proposition is only good as against volunteers, and it has been argued before us that the representatives of the mortgagee in the present case are not volunteers, the mortgagee having purchased the exercise of the power of appointment by the loan of the 1000*l.* Now, in *Fleming* v. *Buchanan* (4) Knight Bruce L.J., in the passage cited by Joyce J. in his judgment, says: "On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention upon his part." Our attention was called to the fact that Knight Bruce L.J. in this passage does not use the word "volunteer" at all, and it is suggested that the rule as laid

(1) 10 Ves. 370.
(2) [1892] 3 Ch. 510.
(3) W. N. (1881) 69.
(4) 3 D. M. & G. 976, 980.

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down by the Lord Justice applies equally whether the person in whose favour the general power is exercised is a creditor or a volunteer.

I somewhat doubt myself whether the Lord Justice did intend to lay down the rule as widely as this, and I am not sure whether it would have been right so to do. It will be observed that the Lord Justice was dealing with a case in which the general power was exercised by testamentary appointment, and in which there was no suggestion of an antecedent charge, or of a covenant to exercise the power, and in which there is nothing to shew that there was any power exercisable by deed as well as by will.

Now, if one applies the rule laid down by the Lord Justice to a case of the exercise by testamentary appointment of a power only exercisable by will, it does not seem to matter whether one limits the rule as to the exercise of a general power of appointment making the subject of it assets for the payment of the appointor's debts to volunteers or does not do so, because in my opinion in such a case every one who takes under the will exercising the power necessarily takes as a volunteer.

The judgment of Stirling J. in *In re Parkin* (1) makes it clear that a contract to leave by will on the part of one who is merely donee of a testamentary power of appointment cannot be enforced by a judgment or decree for specific performance; and it is equally clear that the revocation of a will made in pursuance of such a contract cannot be restrained. The basis of this is that the donor of a power exercisable by will only does not intend that the power should be exercised until death. The donor means the power to remain capable of execution till the death of the donee of the power, and the Court will not assist to defeat the intention of the donor. This being so, all that the lender of the money got by the covenant in the mortgage deed was the covenant, and the right to damages for the breach of it; he did not under the deed get any priority or charge whatsoever. The exercise of the power makes the fund assets at the moment of death, and cannot do so before. It

(1) [1892] 3 Ch. 510, 517.

follows that the position of the lender, in whose favour the power was exercised, is that of a legatee taking by the bounty of the testator; he could not at any time before the death of the testator have asserted any title to or charge on this personal estate. In truth, every one taking under a will is a volunteer, even though the testator may have been under some contractual obligation to make the appointment.

I prefer to base my judgment upon my conclusion that the lender, the mortgagee, Mr. Perkins, was in fact a volunteer, because I have no doubt myself that this rule, making real and personal estate subject to general powers of appointment by will assets for payment of the appointor's debts, was a rule laid down in favour of creditors against volunteers, and I doubt very much whether the original rule had any reference to the priority of secured and unsecured creditors.

STIRLING L.J. I am of the same opinion. I am unable to differ from the reasoning of Joyce J., and, after what has been said by him and said in this Court, I have very few observations to make. It is important, in my opinion, to bear in mind in dealing with this case that the mortgagor had no power of appointment by deed, and consequently the mortgage which was executed by him was ineffectual to create a charge on the fund which was the subject of the power of appointment, or to bind that fund in any way. I think that the case of *Reid* v. *Shergold* (1) is a clear authority for that proposition. For the reasons which were given in the case which I myself decided of *In re Parkin* (2), to which I adhere, I think that the covenant on the part of the mortgagor contained in the mortgage deed to execute the power of appointment by will was incapable of being enforced by way of specific performance; and for the same reasons I think that the covenant not to revoke the will could not be enforced by injunction.

Now, that being so, it seems to me that the mortgage deed amounted to a personal security and nothing more. What the mortgagee got by virtue of that deed consisted simply of the

(1) 10 Ves. 370, 380. (2) [1892] 3 Ch. 510.

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personal covenant of the mortgagor, and as regards the fund itself the mortgagee was content to accept such a title as the will of the mortgagor could confer upon him—that is to say, a title which depended on the bounty of the testator. Now, that title is subject to various infirmities, and amongst others to this—that the law has said with respect to testamentary dispositions that the testator must be just before he is generous, that is to say, that his dispositions can take effect only subject to the payment of his general creditors. I cannot see myself that the applicants in this case have as regards the fund any priority over other creditors of the estate so far as they claim under the will; and it is only by virtue of the will, as I have already said, that they can claim the fund. They are, as between themselves and the other creditors, volunteers.

I should like to say one word as to the only case which was cited as a direct authority in support of the contention of the appellants, namely, the case of *In re Newnham's Estate* (1), before Hall V.-C. That, in my opinion, was a different case. In that case the testatrix, having a power of appointment by will, had induced the trustees of the will to pay over a portion of the fund to her in her lifetime, and she made a will by which she exercised her testamentary power of appointment by directing that the trustees should hold the fund upon trust to pay and indemnify themselves against advances which had been made to her, and subject thereto upon trust for certain beneficiaries. After the death of the testatrix who had so exercised the power by will, the general creditors contended that by appointing the fund she had made it available for payment of her debts, and that the trustees must make good the portions of the fund which they had misapplied before they could prove against the estate for advances. The Vice-Chancellor rejected that contention, saying that, as the creditors of the donee of the power could not get at the property subject thereto except through the appointment, they could not get at it except by recognising the other acts of the testatrix. The report is a short one, and the grounds for the decision are not

(1) W. N. (1881) 69.

clearly stated, but I apprehend that the Vice-Chancellor meant this. Suppose the executors of the testatrix had asked for payment to themselves of the whole fund, the trustees who had made the advances would have had a right to say, "We have already paid a portion of the fund to the testatrix, and it is already part of her assets, and therefore you cannot call upon us to replace it." I think also that the creditors would not stand in any better position than the executors through whom they derived title, and in my opinion the act of the appointor referred to by the Vice-Chancellor was her taking possession in her lifetime of part of the fund subject to the power. In my judgment that does not apply to the present case, and the decision of Joyce J. ought to be affirmed.

COZENS-HARDY L.J. I am of the same opinion. In the language of James L.J. in *In re Hoskin's Trusts* (1), I hold it "to be established beyond all question that where a feme covert, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." The executors here were entitled to recover and have received the appointed fund. The question then arises, What are they to do with it? As a matter of construction this is a demonstrative legacy, and as such it is subject to the payment of the testator's debts. It is said, however, that this is not so, because the will was made in pursuance of a covenant in the mortgage and was not a voluntary transaction. But the applicants take nothing under the mortgage—they take solely under the will. The doctrine of specific performance has no application to a case like the present. The testator covenanted that he would give a legacy, and he has given a legacy. Such a legacy must be taken with all its incidents. There are some legacies which have priority over other legacies, such as legacies to a widow in satisfaction of her dower, or to a creditor in satisfaction of a debt. But it has never been held that such a preferential

(1) (1877) 6 Ch. D. 281, 283.

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legacy can be paid until after all debts are satisfied. A somewhat analogous point arose in the case of *Davies* v. *Bush* (1), before Lord Lyndhurst, and the question there was whether a legacy bequeathed to a lady between whom and the testator accounts subsisted, in consideration of her executing to his executors a release, was entitled to priority. Lord Lyndhurst said: "I am of opinion that, if there was not a debt actually due to the legatee, the legatee cannot be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees." It has never, so far as I know, been suggested that a preferential legatee, even though the legatee be considered as a purchaser, is entitled to payment until after all the debts are satisfied. It may be, though I express no opinion on the point, that the applicants might claim priority over any ordinary legatees of other parts of the 10,000*l.*; but I am clearly of opinion that they cannot claim a penny in their character of legatees as against the testator's creditors.

Solicitors: *Beyfus & Beyfus; Dangerfield, Blythe & Hodgson.*

(1) (1831) You. 341, 343.

H. B. H

In re LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED.

C. A. 1901 WRIGHT J. *July* 31. C. A. 1902 *July* 3, 7, 8, 10, 11.

[00245 of 1899.]

Company—Promoter—Fiduciary Relation—Sale of Property to Company—Secret Profit—Fraudulent Prospectus—Non-disclosure of Promoter's Interest—Liability of Promoter—Measure of Damages—Profit on Sale.

The promoters of a company purchased property for the purpose of selling it to the company when formed. The property was conveyed to a trustee for the promoters nominated by them, and was afterwards by the direction of the promoters conveyed by him to a trustee for the company, who was also nominated by the promoters, they receiving from the company an increased price on the sale. The promoters also nominated the first directors of the company and provided the qualification of some of them. The prospectus of the company, which was issued for the purpose of inducing the public to subscribe for its shares, was prepared with the knowledge and privity of the promoters, so that, as the Court held, they were responsible for it. It did not disclose the fact that the promoters were the real vendors of the property to the company, but, on the contrary, represented the promoters' trustee as the vendor. The company afterwards went into liquidation.

Upon a summons by the liquidator to compel the promoters to account for the profit which they had obtained on the resale of the property:—

Held, that the promoters as such stood in a fiduciary position towards the persons who were invited to take shares in the company, and that it was their duty to disclose to those persons the fact that they were the real vendors to the company:

Held, that the prospectus was a fraudulent one, and that for their breach of duty by this non-disclosure the promoters were liable in damages to the company, and that the true measure of the damages was the profit which the promoters had obtained upon the purchase and resale of the property.

Decision of Wright J. affirmed.

APPEAL from a decision of Wright J.

In the liquidation of a company called the Leeds and Hanley Theatres of Varieties, Limited, an application was made by the liquidator for a declaration that the Consolidated Exploration and Finance Company, Limited, also in liquidation, were liable to contribute to the assets of the Theatres Company the amount of the secret profit made by them in connection with the promotion of the Theatres Company, and in the sale to that

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company of the Leeds music-hall and the Hanley music-hall, or, alternatively, a declaration that the Finance Company were liable to contribute to the assets of the Theatres Company compensation for their misfeasance in inducing the Theatres Company to purchase the Leeds and Hanley music-halls without proper disclosure, and at a fraudulent overvalue, and for consequential relief. The Finance Company were charged with having bought the two halls for 24,000*l.*, and having, without disclosing that as the price paid, sold them to the Theatres Company for 75,000*l.*; also with having issued a fraudulent prospectus.

The Finance Company, who, as Wright J. said, were undoubtedly the promoters of the Theatres Company, heard that the Leeds and Hanley music-halls were for sale, and they agreed with the proprietors of the halls to form a company to take over the halls.

The principal material dates and facts were thus summarised by Wright J. On December 21, 1896, the board of the Finance Company resolved to take over the two music-halls on the terms of a draft contract then approved. The contract referred to the intended Theatres Company as the intended ultimate purchaser, and provided for part of the purchase-money (7000*l.* in one case and 9000*l.* in the other) being left on mortgage of the halls, if the intended company should so require; but, upon the company obtaining three-fourths of its capital from public subscription, it was to pay off the mortgages. The contract for the purchase of the Hanley music-hall for 10,500*l.* was apparently signed by George Rands, a trustee for the Finance Company, on the same day (though dated December 15), and a deposit of 1000*l.* was paid by the Finance Company out of their own money. Afterwards a similar contract for the purchase of the Leeds music-hall for 13,500*l.* was signed and a deposit paid. On February 1, 1897, Rands entered into a contract, by which he purported to sell the two halls to W. O. Carter, as trustee for the intended company, for 75,000*l.*, which, under another document dated February 13, was to be paid as to 17,500*l.* in cash, as to 16,000*l.* by mortgages to be given by the company, as to 10,000*l.* by debentures of the company, and as

to 31,500*l.* by fully paid shares of the company, the vendor undertaking to pay all preliminary expenses and to spend up to about 5000*l.* in structural alterations. In the meantime the Finance Company had settled the memorandum and articles of association of the Theatres Company, and had registered it on February 2, the signatories to the memorandum being provided, paid, and indemnified by the Finance Company. On February 3 Rands executed a declaration of trust in favour of the Finance Company. On February 4 the directors of the Theatres Company, who had been appointed by the Finance Company, and some of whom had received their qualification from that company, held their first meeting, and approved the prospectus and adopted the purchase by the trustee. On February 19 and 20 the Finance Company, on the one hand, signed a cheque for 6000*l.* on account of the purchase-money for the original vendors, and, on the other hand, received the same sum from the Theatres Company out of the proceeds of subscription for its shares. Afterwards the arrangement was completely carried out, the Theatres Company paying to the Finance Company the balance of the 17,500*l.* and giving mortgages for the 16,000*l.*, debentures for the 10,000*l.*, and the 31,500*l.* in fully paid shares of 5*l.* each. The Finance Company on their part paid the expenses of the promotion of the Theatres Company, amounting to 5436*l.*, and the cost of structural alterations of the halls, amounting to 3730*l.*, and other sums, with the result that out of the cash received by them from the Theatres Company 312*l.* remained in their hands. The 10,000*l.* of mortgage debentures realized about 2300*l.*, and there was no other evidence of the value of them at any time. The Finance Company sold some of their shares at prices exceeding 3*l.* for each 5*l.* share. The music-halls were worked at a loss, and the Theatres Company was ordered to be wound up. The halls were sold by the mortgagees for about 19,000*l.*, which left for the Finance Company, as holders of the 10,000*l.* mortgage debentures, the above-mentioned sum of about 2300*l.*

This statement of facts was read by Vaughan Williams L.J., and was adopted by him as accurate with one exception—namely, he said he thought the cheque for 6000*l.* drawn by the

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Finance Company on February 19 was cashed before that company had received any money from the Theatres Company.

The prospectus stated that the capital of the company was to be 80,000*l.* in 16,000 shares of 5*l.* each, and it also contained (inter alia) the following statements: "This company has been formed for the purpose of acquiring as going concerns the substantial and magnificent freehold properties known as the Princess Palace of Varieties (which will in future be called the Tivoli), Leeds, and the Empire Palace of Varieties, Hanley, together with the licences, furniture, fittings, scenery, and effects, and for further improving and carrying on the same as first-class variety theatres."

With regard to the Leeds property it was stated: "The building was erected about eight years ago in a most substantial manner, and, as the vendor undertakes to redecorate, refurnish, and upholster the hall in a thoroughly up-to-date style, fit it throughout with electric light, and carry out several other important alterations, free of cost to the company, it will be one of the handsomest and most commodious variety theatres in the kingdom.

"The vendor undertakes to transfer the freehold properties, together with the licences, fittings, fixtures, &c., decorated and furnished throughout, as first-class variety theatres, and fitted with electric light, in accordance with the plans and specifications of the company's architect, and to pay interest to the shareholders at the rate of 7 per cent. per annum, during such time as is necessary for the premises to be closed for the purpose of carrying out the alterations.

"The price to be paid for the freehold properties, together with the buildings, including the bars, furniture, fittings, scenery, plant, property, and effects, has been fixed at 75,000*l.* This will leave a working capital of 5000*l.*, which will be ample, seeing that the premises will be handed over completely decorated, furnished, and equipped as first-class variety theatres, and the business is entirely a ready-money one.

"The vendor, who has the fullest confidence in the success of the company, will defray all expenses of registration, printing, advertising, &c., up to and including allotment, and

stipulates for the right to apply for and have allotted to him, in part payment of the purchase-money, one-third of the share capital issued, on the same terms as the allotment is made to the public.

"The following contracts have been entered into: (*a*) Contract dated January 12, 1897, between J. M. Barwicke, William Lea, and Joseph Holt of the one part, and George Rands of the other part. (*b*) Contract dated December 15, 1896, between L. Broadbent and E. A. Carpenter of the one part, and the said George Rands of the other part. (*c*) Contract for sale dated February 1, 1897, between the said George Rands of the one part, and W. O. Carter, as trustee on behalf of the company, of the other part."

The prospectus did not disclose the fact that the Finance Company were the real vendors to the Theatres Company, or that they were making a large profit upon the sale.

1901. July 31. WRIGHT J., after stating the facts, said:— Under these circumstances, what were the duties of the respondents to the company which they had projected and promoted? Plainly they were bound to disclose to the company that they were the real vendors, and the price at which they had bought and the profit which they were to make, and, failing such disclosures, the company would have been entitled to rescission of the contract of purchase, and the respondents must then have returned the price paid by the company, if rescission had been possible. Rescission is not now possible, because the mortgagees of the halls have enforced their security, and have sold to persons out of whose hands the halls cannot now be taken. But it seems to me clear on the facts of this case that the respondents ought to be held to have bought the halls as agents or trustees for the intended company, with whose money the purchase-money was to be paid. They never intended to buy the halls for themselves, or to pay for them out of their own money. They always intended to act for the projected company, and the purchase was never completed until that company had been formed, and had been caused by

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the respondents to adopt the purchase and to provide most of the means for completion.

I think, therefore, that they must account to the company for the profit received on a purchase made on its behalf and at its cost.

Further, I think that the respondents are liable on the ground that they imposed on the company directors of the respondents' own selecting, and through these directors caused the company to agree to pay an excessive price, without any disclosure that the directors were of their own selection, and without any disclosure to the company of the facts necessary to enable a judgment to be formed upon the question of price. An independent board informed of the facts would certainly not have adopted the purchase. The respondents made it impossible for the company to obtain independent advice, and imposed their own terms, concealing the material facts. They must, therefore, disgorge to their cestuis que trust the benefit which they have extorted from them by taking an undue advantage of their position and influence.

Another ground of liability is that a prospectus of the company was prepared and issued for it by the respondents, containing material representations which were false, or false and fraudulent, and which were part of the inducement to purchase. For the damages sustained by reason of these misrepresentations the respondents may be liable to an extent not necessarily limited by the benefit which they have received. There was a representation that Rands, an impecunious clerk who acted as vendor for a customary fee of 5*l.*, was the real vendor, "who has the fullest confidence in the success of the company," and will, therefore, defray all preliminary expenses, and stipulates for the right to take one-third of the purchase-money in fully paid shares. [His Lordship referred to another misrepresentation in the prospectus, and continued:—]

In my judgment each of these representations was false and fraudulent, and was a material inducement to the more innocent directors (if they were innocent) to adopt the purchase of the halls, and to the public to come in as shareholders and provide

the moneys without which the respondents' venture would have been unproductive.

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On these grounds the company could, irrespectively of the fraud, have repudiated its purchase, if it had known the facts in time, and it could now maintain a common law action for damages for the deceit, in which the measure of damages would presumably be the amount of the damage which the company had sustained in consequence of the fraud, and the measure of that damage as against the wrong-doer would probably be primâ facie the whole cost to the company of its purchase, less any benefit which it can be shewn to have received.

The assets of the respondents available to answer the applicant's claim do not, as I understand, exceed 12,000*l.*

On either view of the case their liability exceeds that amount, and the order will be that they make compensation to that amount, with interest at 4 per cent. on the sum obtained from the company, and that they pay the costs of the proceedings.

C. A.

The liquidator of the Finance Company appealed. The appeal came on for hearing on July 3, 1902.

Hon. E. C. Macnaghten, K.C., and *Kenyon Parker*, for the liquidator of the Finance Company. The mere fact that the Finance Company bought the music-halls and sold them to the Theatres Company did not make them promoters of the latter company. They did not purchase for the intended company. There is no proof of either fraud or damage resulting to the Theatres Company. There was nothing fraudulent in the prospectus. Nothing was said in it about the price given for the halls. It may be that the Theatres Company could have obtained rescission of the contract for purchase; but that is impossible now, for the property cannot be restored. It has not been proved that the Finance Company when they purchased the halls stood in a fiduciary relation to the Theatres Company, and they cannot, therefore, be made liable for the difference between the price which they paid and that for which the property was sold to the Theatres Company: *Erlanger* v. *New Sombrero Phosphate Co.* (1); *Tyrrell* v. *Bank of London* (2);

(1) (1878) 3 App. Cas. 1218, 1235. (2) (1862) 10 H. L. C. 26.

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Burland v. *Earle* (1); *In re Cape Breton Co.* (2) If the company affirm the contract for purchase, they are not entitled to any relief: *Bentinck* v. *Fenn* (3); *Ladywell Mining Co.* v. *Brookes.* (4)

The next question is, Can damages be recovered from the Finance Company? It is submitted that they cannot. If they had stated a false price in the prospectus they would, no doubt, have been liable in damages; but they did not do so. To make a person or company liable in damages, you must prove the case to be one for damages at law. The making of a secret profit by a person standing in a fiduciary or quasi-fiduciary relation to another does not of itself support a claim for damages: to support such a claim the secret profit must be a fraudulent secret profit: *Luddy's Trustee* v. *Peard* (5); *Hichens* v. *Congreve* (6); *In re Olympia.* (7) Again, gross negligence involves damages. But in all cases fraud or negligence must be proved. To establish a case of misfeasance on the part of the vendor to a company, it is necessary to prove all the elements that go to make up that misfeasance—that is, a breach of duty resulting in actual loss to the company: *Bentinck* v. *Fenn* (8); *In re Cape Breton Co.* (2) There is no such evidence here. There is no evidence that the Theatres Company did not know what the price paid by the Finance Company was. Again, there is no evidence of non-disclosure to the Theatres Company, nor of overvalue, nor indeed as to what the real value of the property was, nor of the prospectus having been brought before the board of the Finance Company. The Theatres Company have, in short, made out no case against the Finance Company: suspicion there may be, but that is not sufficient. Unless the Finance Company stood in a fiduciary relation to the Theatres Company, there can be no question of secret profit at all. The Finance Company

(1) [1902] A. C. 83, 98.
(2) (1885) 29 Ch. D. 795, 802, 803.
(3) (1887) 12 App. Cas. 652.
(4) (1887) 35 Ch. D. 400.
(5) (1886) 33 Ch. D. 500.
(6) (1831) 4 Sim. 420.
(7) [1898] 2 Ch. 153; S.C. sub nom. *Gluckstein* v. *Barnes*, [1900] A. C. 240, 248.
(8) 12 App. Cas. 658–9, 660–1, 666.

purchased the property really as a speculation on their own behalf, and were ready to sell to any person or company that might offer. They were not promoting the Theatres Company at that time: it was not until two months after they bought the property that they promoted the Theatres Company. So that at the time they bought they did not stand in a fiduciary relation to the Theatres Company. To constitute the relation of trustee and cestui que trust in the matter of a purchase, there must be persons filling that position at the time of the purchase. To establish liability against a person as agent or trustee in respect of a particular transaction, it must be shewn that there was, at the time, a principal or cestui que trust in existence and capable of enforcing the obligation against that person: *Erlanger* v. *New Sombrero Phosphate Co.* (1); *Bentinck* v. *Fenn.* (2) Even if there was overvalue here, that is not of itself evidence of fraud.

Younger, K.C., and *W. H. Cozens-Hardy*, for the liquidator of the Theatres Company. The Finance Company was a company whose only purpose was the promotion of companies; and in the present case there is no pretence for saying that it bought this property as a speculation of its own without having a sale in contemplation at the time. This is not a case in which A. buys and pays for the property, and afterwards determines to sell, and therefore it does not fall within *Erlanger* v. *New Sombrero Phosphate Co.* (1), where the property was bought and paid for by the promoters. The cases establish that if a vendor or promoter never intended to buy or pay for the property himself, but that a company was to be formed for that purpose, the Court will make his liability relate back to the purchase: *Gluckstein* v. *Barnes.* (3) In this case, as in that, "the essence of the scheme was to form a company." (4) It is an important question for consideration in such cases whether the property has been paid for by the promoter himself or by the company he is promoting. The fiduciary relation may exist before the actual formation of the company:

(1) 3 App. Cas. 1218, 1242.
(2) 12 App. Cas. 652.
(3) [1900] A. C. 240; S.C. *In re Olympia*, [1898] 2 Ch. 153.
(4) [1900] A. C. 246; [1898] 2 Ch. 165.

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Gluckstein v. *Barnes.* (1) In *In re Cape Breton Co.* (2) the circumstance which created the difficulty was that the property was bought and paid for by the promoters, whereas in *In re Olympia* (3) they paid for what they bought out of money got from the company to which they sold it, as was also the case here.

[VAUGHAN WILLIAMS L.J. referred to Buckley on Companies, 8th ed. pp. 661–2.]

According to *Gluckstein* v. *Barnes* (4) and *In re Lady Forrest* (*Murchison*) *Gold Mine, Limited* (5), there may be two grounds of complaint against the promoters: (1.) The intention to form a company for the purpose of working the property bought, there being no intention on the part of the promoters to work it themselves, added to which they do not in fact work it; and (2.) direct and deliberate misrepresentation to the public to induce them to come in and subscribe. Either ground will do in order to fix the promoters with liability, and will support the present case. In *Ladywell Mining Co.* v. *Brookes* (6), the judgment proceeded largely on the ground that the vendors to the company bought the property with no intention to defraud. In *Burland* v. *Earle* (7) the director who purchased the property and resold it to his company himself paid for the property. It is submitted that as from the date of the contract for purchase the Finance Company were trustees for the Theatres Company: *Gluckstein* v. *Barnes* (4); also that the prospectus was a deliberate fraud on the part of the Finance Company, intended to hoodwink the shareholders of the Theatres Company and to obtain from them the money, the produce of the former company's nefarious plans. (8) When you find the prospectus is the work of the promoters, you may take its representations as being those of the promoters to induce the company to buy the property: *Erlanger* v. *New Sombrero Phosphate Co.* (9) If the respondent has proved

(1) [1900] A. C. 249; S.C. *In re Olympia*, [1898] 2 Ch. 170.
(2) 29 Ch. D. 795.
(3) [1898] 2 Ch. 170.
(4) [1900] A. C. 240.
(5) [1901] 1 Ch. 582.
(6) 35 Ch. D. 400.
(7) [1902] A. C. 83.
(8) [1900] A. C. 247.
(9) 3 App. Cas. 1218.

fraud, it is clear he is entitled to recover the secret profit: *Gluckstein* v. *Barnes*. (1)

In re Lady Forrest (Murchison) Gold Mine, Limited (2), is distinguishable from the present case. There the persons whom it was sought to make liable were not agents or promoters of the company. The present case cannot be distinguished from *Gluckstein* v. *Barnes*. (3) In that case promoters of a company were ordered to pay to the company a secret profit which they had made on the sale of property to the company. But, if damages are given, the measure would be the amount of the profit obtained. Relief may be given on the basis of a trust, although the company was not in existence when the wrongful act was done: *Lydney and Wigpool Iron Ore Co.* v. *Bird*. (4)

[ROMER L.J. Though a man cannot be an agent for a non-existent company, may he not be a trustee for it? There can be a trustee for unborn children.]

Lindley on Companies, 6th ed. pp. 482 et seq.; Buckley on the Companies Acts, 8th ed. pp. 657. The fact that the mortgagees sold the halls for 19,000*l.*, after a large sum had been expended on them, shews that they were not worth 24,000*l.*, and that is sufficient to entitle the liquidator to an inquiry as to damages.

But if the principle of *Gluckstein* v. *Barnes* (3) does not apply, the Finance Co. are liable for the same amount on the principle of *Bagnall* v. *Carlton*. (5) In that case a company recovered from promoters the amount which they had received under a secret agreement. That principle applies to the present case. The Finance Company received the whole of what Rands nominally received from the Theatres Company, and that company is entitled to recover from the promoters, the Finance Company, the profit which they obtained upon the sale, even if the property was worth the 75,000*l.* given for it. If, as they in effect stated in the prospectus, the Finance Company were not the vendors to the Theatres Company, still *Bagnall*

(1) [1900] A. C. 247.
(2) [1901] 1 Ch. 582, 588.
(3) [1900] A. C. 240.
(4) (1886) 33 Ch. D. 85, 94.
(5) (1877) 6 Ch. D. 371.

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v. *Carlton* (1) shews that as promoters they must account for their secret profit. If the onus is upon the Theatres Company to prove non-disclosure it is amply proved. There was no independent board of directors, and the prospectus did not disclose the fact that the Finance Company were the vendors, but, on the contrary, deliberately concealed it. The fiduciary relation of the Finance Company had commenced when they purchased the property. It is sufficient if it was their intention when they bought it to transfer it to the company. The Finance Company could not have retained the music-halls and carried them on themselves: that would not have been within their statutory powers. They were obliged to sell the halls at once. In *In re Olympia* (2) Lindley M.R. distinguished that case from *In re Cape Breton Co.* (3) on the ground that in the latter case the promoters themselves paid for the property which they afterwards sold to the company, and that distinction applies here. That promoters are liable for concealment in the prospectus of the company which they promote is shewn also by *Erlanger* v. *New Sombrero Phosphate Co.* (4); *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (5)

There has been a fraudulent breach of duty which gives a right at law at any rate to nominal damages, and there is evidence of substantial damage: *In re Olympia.* (6)

Hon. E. C. Macnaghten, K.C., in reply. There is nothing amounting to an estoppel against the Finance Company: *Pickard* v. *Sears.* (7) There is nothing to shew that the shareholders relied upon Rands being the vendor. In *Erlanger* v. *New Sombrero Phosphate Co.* (4) the relief given was not based on the ground that a nominal vendor was put forward. But here Rands was really the vendor. The property was legally his. The Finance Company, if they were the vendors, were not when they bought the halls trustees for the Theatres Company; they were not bound to sell the halls to that com-

(1) 6 Ch. D. 371.
(2) [1898] 2 Ch. 153, 170.
(3) 29 Ch. D. 795.
(4) 3 App. Cas. 1218, 1264, 1265.
(5) [1899] 2 Ch. 392, 428.
(6) [1898] 2 Ch. 179.
(7) (1837) 6 Ad. & E. 469; 45 R.R. 538.

pany, but could have sold to any one they chose. The true view is that which was stated by Lord Davey in *Burland* v. *Earle* (1), that the question is whether the Finance Company were under a legal obligation to give the Theatres Company the benefit of their purchase. The case is distinguishable from *In re Olympia* (2), and what Lindley M.R. said in that case, quoting from Jessel M.R. in *In re British Seamless Paper Box Co.* (3), does not apply here. Both fraud and damage must be proved by the respondent: *Derry* v. *Peek* (4); and here there is no proof of damage. It cannot be assumed that there was damage merely because of the difference in price. Nor is the fact that the mortgagees two years afterwards sold the property for less evidence that it was not worth what the Theatres Company gave for it when they bought it. A sale by a mortgagee is generally made at a comparatively low price. The prospectus was issued by the Theatres Company, not by the Finance Company, and there is nothing to shew that the statements contained in it were the cause of the loss. There is not enough to found an action for deceit.

VAUGHAN WILLIAMS L.J., after stating the facts as above, continued:—The first way in which it is sought to make the Finance Company responsible to the Theatres Company is this. It is said that at the time when the Finance Company purchased the music-halls they were acting on behalf of the Theatres Company, which had not then been incorporated. The date of incorporation was February 2, and it is said that, as the purchase was made on behalf of or for the benefit of the company which was to be created, it was a purchase by the Finance Company either as agents or as trustees for that company, and, the purchase having been made by the Finance Company at a total price of 24,000*l.*, any sum beyond that price paid to the Finance Company by the Theatres Company was paid for nothing, because the property had already been bought for them or for their benefit at the price of 24,000*l.*, and they were entitled to have it handed over to them by

(1) [1902] A. C. 99.
(2) [1898] 2 Ch. 153, 169.
(3) (1881) 17 Ch. D. 467.
(4) (1889) 14 App. Cas. 337.

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their trustee or agent at that price, and he had no right to retain —at all events no right secretly to retain—or to claim a single sixpence beyond the price at which he had purchased as agent or trustee for the Theatres Company.

I do not see my way to arrive at the conclusion that this property was so purchased for the benefit of this company to which it was sold. Taking, however, the view which I am about to express, I do not think it is incumbent upon me to lay down any general proposition of law which is not absolutely necessary for the decision of the case, and I had better not do so. I will not, therefore, say that it is impossible for a purchase to be made on behalf of or as agent or trustee for an unformed company; but if it is possible, I am not at present prepared to express that proposition in the affirmative in words which appear to me logically satisfactory. I will say no more about it, for I do not propose to base my judgment upon the hypothesis that the Finance Company at the moment of the purchase were acting as the agents of or the trustees for the company which was about to be created.

It seems to me that another way in which Mr. Younger put his case is much more easy to accept, and it is this. He said that from first to last it is perfectly plain that the Finance Company were acting as the promoters of the Theatres Company. I have not a doubt of that. If you trace all the proceedings of the Finance Company, as detailed in their own minutes, it seems to me clear that they were acting and intending to act as promoters of this company, which was to buy the music-halls from them.

The conclusion at which I arrive, taking all the facts together, is, that from first to last the Finance Company were promoters; that from first to last their intention was to buy the music-halls for the purpose of selling them to a company which they should create. They intended from the first to do that which they ultimately did—to create a board of directors which should be under their control and carry out their desire, which it is abundantly clear upon the evidence was to sell the music-halls which they had bought for 24,000*l.* at an inflated price.

Now, if I am right in saying that the Finance Company were promoters from first to last of the Theatres Company, it follows that the Finance Company throughout this period stood in a fiduciary relation towards the Theatres Company. At first there were only four directors, who had been nominated and some of whom were qualified by the Finance Company, and the seven necessary signatories of the memorandum of association. When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories. It means that they stood in a fiduciary relation to the future allottees of shares—to the persons who were invited to come and take up the shares of the company. Upon the face of the minutes of the Finance Company it is perfectly manifest that as early as December, 1896, the Finance Company had made up their minds, not only to promote a company, but also what sort of company it was to be, because they state in one of their minutes that there is to be an appeal to the public to come in and take up the shares.

This, then, being the position of the Finance Company, and these being the persons to whom they stood in this fiduciary position, what duty did that position involve? In the first place, in my judgment, it was their plain duty to disclose the fact that they themselves were interested as the beneficial vendors of the music-halls. It is said there is no proof that they did not make such a disclosure. To my mind, the prospectus of the Theatres Company, whether the Finance Company were or were not generally responsible for it, is the plainest possible proof that they made no such disclosure. I will not consider whether they made a disclosure to the directors who were their nominees. I do not think it matters whether they did or did not, for, as I have already pointed out, among their cestuis que trust are included the future allottees of shares. What, then, did the prospectus disclose to the future allottees? As regards the authorship of the prospectus, I do not say that the evidence shews conclusively who should have the credit of it; but, however that may be, it is, I think, plain that the prospectus was issued with the knowledge and privity of the

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Finance Company. How far (to use the phrase which has been applied to them) the nonentities who had been placed on the board of the Theatres Company by the Finance Company took part in the preparation of the prospectus I do not know, and I do not care. It is sufficient that the Finance Company were, at all events, privy to its issue. [His Lordship read the passages above quoted from the prospectus.] What does that state to the public? It states in effect that the real vendor to the company is Rands, and that he has such confidence in the future of this company that, having the option to receive payment largely in cash, he elects to take a larger portion of the purchase-money than he need have taken in shares of the company. When such a document is issued to the public—to the persons who are invited to become allottees of shares—it is perfectly plain that to those persons, who are included amongst the cestuis que trust of the promoters, there was not only no disclosure that the Finance Company were the real vendors, but there were affirmative statements which invited to a contrary conclusion. I will refer to some dicta as shewing that I have ample authority for including amongst the cestuis que trust of the promoters the persons who are invited to accept allotments of shares. In *New Sombrero Phosphate Co.* v. *Erlanger* (1) Baggallay L.J. said: "The syndicate were, in substance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances." Again, in *In re British Seamless Paper Box Co.* (2) Jessel M.R. said: "I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it

(1) (1877) 5 Ch. D. 73, 123.

(2) 17 Ch. D. 467, 471.

makes no difference whatever that the persons who, at the time the allotment was made, were in fact the promoters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees." In the same case on appeal Brett L.J. said (1): "If when parties are promoters of a company, and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company but for future members, and they keep it secret, they can be made liable to account by future shareholders under the 165th section." And Cotton L.J. said (2) that the principle "is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in."

Having regard to that ample authority for the proposition that among the cestuis que trust who are entitled to this fidelity from the promoters are included those who, it is hoped, will become shareholders, as well as the actually existent shareholders at the time of the issue of the prospectus, it seems to me that this prospectus proves up to the hilt, not only that there was no disclosure of the interest of the Finance Company or that they were really the vendors, but a positive suggestio falsi in the statements made in relation to the interest of Rands.

There being then this breach of duty, the next question is whether under these circumstances the Theatres Company are now entitled to a remedy as against the company which thus acted in relation to the promotion. In my judgment, they are entitled to a remedy, but I think it is a remedy in the nature of damages. To put it in a short common law form, I am not sure that the Theatres Company can, in reference to this breach of fiduciary duty by their promoters, maintain an action in the nature of an action for money had and received. I think the safer way of putting it is to say that their remedy is in damages. The authorities are not all perfectly conclusive that there is no remedy by way of an account of profits, but I prefer to say that, whether there is such a remedy or not, I am clear that there is a remedy in the shape of damages.

(1) 17 Ch. D. 477. (2) 17 Ch. D. 479.

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Now, Mr. Macnaghten has argued, not so much that there is no remedy by way of damages, as that damage has not been proved. It must be observed that the Theatres Company have not rescinded the contract for purchase; they have not attempted to do so. Indeed, it would have been impossible for them to do so. It was part and parcel of the original arrangement that there should be these mortgages, and after that large portion of the price had been raised on mortgage it would have been impossible to rescind the contract. They could not replace things in statu quo. But, in my judgment, although the Theatres Company cannot give back the property and ask that their money should be returned in toto, they are entitled to damages for this breach of duty.

Let us first see what injury has been really done to the Theatres Company by this course of conduct. They have purchased for a total sum (I do not say they can charge all that sum now) of 75,000*l.* that which the Finance Company purchased for 24,000*l.* It is said that is no proof of damage, because non constat that the Finance Company did not buy very cheaply, and non constat that music-hall property has not gone up in value in the interim. But we have this additional fact, that the mortgagees have lately sold these properties and have realized only 19,000*l.* In estimating damages one is not bound to prove everything conclusively. It is sufficient if you prove a state of things from which an inference may be fairly drawn. To put an extreme case—if you employ a valuer to value a property and a question afterwards arises as to the value, he very probably makes a valuation two or three days before it is actually used. Of course, the value of the property may have altered in those two or three days; but no one can say that on that account the valuation of two or three days before is not some evidence of the probable value of the property afterwards. So here, when you have property purchased for 24,000*l.* in 1896, and a year or two afterwards it realizes only 19,000*l.*, it seems to me that primâ facie goes to shew that 75,000*l.* was a very excessive price. I have mentioned the 75,000*l.* because it is convenient so to do, but of course large deductions must be made for the money which had to be

expended by the promoting company, partly in promotion expenses and partly in redecorating the halls and such like. But it is agreed that the cash difference is something over 40,000*l.*; and under these circumstances, how can it possibly be said that Wright J. was not justified by the evidence when he fixed the difference at 12,000*l.*?

Under the circumstances, it seems to me that there is here so wide a margin of probable excess that one can clearly say on the evidence that the price was excessive, even in cash, at least to the extent of 12,000*l.*

In my judgment, there has been a clear breach of the fiduciary duty of the promoting company—a breach which, in part at all events, took place after the incorporation of the Theatres Company; and I think there is sufficient evidence of money damage sustained by the Theatres Company, and that the estimate of 12,000*l.* made by Wright J. is amply supported by the evidence.

Romer L.J. I will not say that there is not more than one ground on which the judgment of the Court below can be supported. It is sufficient to base my judgment on the ground which I am about to mention. In the view which I take of the facts I think the law is clear, and it is unnecessary for me to review the authorities, or to consider some of the many nice questions of law which have been argued before us.

Now, in the first place, it is clear that the Finance Company were the promoters of the Theatres Company, and on the evidence taken as a whole I think it is established that the prospectus which was issued, and which induced the shareholders of the Theatres Company to take shares in that company, was prepared, printed, and issued under such circumstances as to make the Finance Company responsible for its issue and contents. I do not think it necessary to go through the details of the evidence bearing on this point. Some parts of it are no doubt open to criticism; but, taken as a whole, the Theatres Company have, in my opinion, established that which I have stated.

Then, when I look at the prospectus I am satisfied that it

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was fraudulent. It not only concealed the fact that the Finance Company, who were the promoters of the Theatres Company, were the real vendors of the property, but it contained actual misrepresentations which, in my opinion, were of a material character, bearing in mind the true position of the Finance Company. I refer in particular to the following clause in the prospectus: "The vendor" (and the vendor is identified in the prospectus with Rands), "who has the fullest confidence in the success of the company, will defray all expenses of registration, printing, advertising, &c., up to and including allotment, and stipulates for the right to apply for and have allotted to him in part payment of the purchase-money one-third of the share capital issued, on the same terms as the allotment is made to the public." Now, the evidence shews that Rands had no interest whatever in this property. He was a mere dummy—a person who allowed his name to be used in this and other similar transactions by the Finance Company for some small payment made to him on each occasion. In the present case I believe he got 5*l.* for the use of his name.

Now, this paragraph which I have read is cunningly framed so as intentionally to convey a false impression, and a false impression of a material kind. It was calculated to cast away from the mind of any person who read it the idea that the promoters of the company had anything to do with the vendor, or were interested in the profits which he obtained. It says that the vendor—that is, Rands—had "the fullest confidence in the success of the company"—a deliberate falsehood. He had no confidence whatever in the matter. It did not matter to him one penny what became of the properties or of the company. Then it says, he "stipulates for the right to apply for and have allotted to him in part payment of the purchase-money one-third of the share capital." He had made no such stipulation. He was, as I have said, wholly uninterested in the matter. The Finance Company, the promoters, had themselves arranged the price, and the way in which it should be paid, entirely for purposes of their own. And I would call attention to the cunning use of the word "stipulates" here. It was calculated to induce intending shareholders to believe

that there was some independent person as vendor who had been, as it were, bargaining with those who represented the interests of the company. Now, if the vendor had been an independent person who had been dealing with the promoters of this company, looking after the interests of the company, it would be important for an intending shareholder to consider that the vendor, parting with his property, had so much confidence in the success of the company that he had stipulated that he should get part of the share capital in payment. To my mind this was a most fraudulent prospectus, and intentionally so on the part of those who were responsible for it; and under the circumstances it was a fraud perpetrated by the Finance Company upon the Theatres Company. It was the duty of the Finance Company, as promoters, under the circumstances of this case, to take care that an independent board of directors was provided on behalf of the company which it was bringing into existence. There were four directors, and it appears that none of those four ever took any share or interest in the Theatres Company. Two of the directors were qualified, or, in other words, bribed, by the Finance Company, one of them being a director of the Finance Company. As to the other two, there is no direct evidence with regard to their position. But I will put the case with regard to them in the alternative. Either they knew the true facts connected with the promotion of the company and the position of the Finance Company as promoters, or they did not. If they did know, they were parties to a fraudulent prospectus—to a fraud on the shareholders, which could only have been committed in the interests of the Finance Company. If they did not know the true facts, then they were kept in ignorance of those facts improperly by the Finance Company.

Then, I ask, What was the result of this fraud? and I cannot doubt the answer. In my opinion, this fraud caused the Theatres Company to part with money or incur liabilities to the extent of 43,500*l.*, and also to part with shares the nominal value of which, together with the 43,500*l.*, would make up the purchase price of 75,000*l.*; and in return for this outlay the Theatres Company obtained the two properties the subject of the contract of sale to them.

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Under these circumstances, if it be proved that the two properties so obtained by the Theatres Company were at that time worth substantially less than the property which they parted with as the consideration, then, in my opinion, the difference in value is the damage suffered by the Theatres Company in consequence of the fraud of the Finance Company for which that company is liable.

This brings me to the next question. Has the undervalue of the two properties at the time in question been established? In my opinion, it has. There is evidence which, to my mind, goes to establish the fact of the undervalue, and there is no evidence the other way. In the first place, I think the price given under the contracts of purchase by Rands, coupled with the sum expended on the properties before the Theatres Company acquired them (and that sum expended is in evidence), afford some evidence of the then value of the two properties. Again, I think that the price at which the two properties were subsequently sold does nevertheless afford some evidence of value; and those two pieces of evidence taken together are, I think, sufficient to shew that there was a substantial undervalue, in the absence of any evidence to the contrary. I say there was no evidence to the contrary, for the price of 75,000*l.* fixed by the Finance Company is clearly no evidence of value. Nor is there, in my opinion, any other evidence of value on which reliance can be placed.

I think, therefore, that the evidence is sufficient to prove the fact of damage suffered by the Theatres Company by reason of the fraud of the Finance Company; and it further proves this, that the amount of that damage is certainly not less than either of the two sums I am about to mention: First, the amount of the profit made in the transaction by the Finance Company, treating the purchase and the resale of the property as one transaction; secondly, the sum of 12,000*l.* mentioned in the order of Wright J. That being so, whether the precise wording of the judgment of Wright J. can or cannot be wholly upheld, the substance of his judgment is perfectly correct from the point of view which I am taking of the case. I think, therefore, on this view of the case, which appears to me a clear one, the appeal fails and should be dismissed with costs.

STIRLING L.J. I am of the same opinion, and substantially for the same reasons.

In my judgment it has been established, first, that the Finance Company have as promoters of the Theatres Company committed a misfeasance in the nature of a breach of trust; and, secondly, that by reason of that misfeasance the Theatres Company has sustained loss to at least the amount of 12,000*l.*

I will state shortly the grounds on which I arrive at that conclusion. It is unquestionable that the Finance Company were promoters of the Theatres Company. The Finance Company in December, 1896, acquired two properties, buying in each case in the name of one Rands. They afterwards set themselves to promote the Theatres Company. It was their duty as such promoters, dealing with and proposing that the company which they were promoting should acquire property belonging to themselves, to (in the language of Lord Cairns (1)) "provide the company with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made." The board of directors whom the Finance Company provided consisted of four persons. One was a director of the promoting company; another is shewn to have received shares gratuitously from the promoting company; as to the other two we know nothing.

I will not stop to consider whether in that state of circumstances the promoters performed their duty of providing a board consisting of competent and impartial judges whether the purchase ought to be made or not. The more material point to consider is this: Was disclosure made of the fact that they, the promoting company, were themselves the owners of the property which they proposed that the Theatres Company should buy? I need not cite any authority to shew that the non-disclosure of such a matter is a misfeasance, beyond reading a few words from the speech of Lord Macnaghten in *Bentinck* v. *Fenn* (2) with reference to the position of

(1) 3 App. Cas. 1236. (2) 12 App. Cas. 652.

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Mr. Fenn in that case, who stood in a fiduciary position to a company to which it was alleged he had not disclosed an interest which he possessed. Lord Macnaghten said (1): "I think that if a person in the position of Mr. Fenn abstained from disclosing his interest, and thus led the board to purchase the property for more than it was really worth, it would be very difficult for him to escape from the charge of fraud. I think it would have been a fraud for him to have concealed his interest and so to have represented, in fact, that he was not interested in the property, and that it belonged to other persons who were not connected with the scheme."

Now, is there evidence that the interest of the promoters, the Finance Company, in this property was not disclosed? In the first place, we have the sworn statement of two witnesses, who were believed by the learned judge, and as regards whose statements in these respects I see no reason to question the conclusion at which he arrived. But, to my mind, there is much more than that. The Finance Company proceeded to procure a prospectus to be issued. That prospectus contains the statements which have already been commented on by Romer L.J., with whose opinion about them I entirely agree. Now, that prospectus was no doubt issued to the public by the directors of the Theatres Company, but it was issued with the privity and knowledge of the directors of the Finance Company. Assuming, as I think I am bound to do, that the two directors of the Theatres Company, as to whose position we know nothing, were honest men, I think it is impossible to suppose that the true state of the case as regards this property was disclosed to them. No honest men could, as it seems to me, have assented to the publication of a prospectus containing such statements with reference to the vendor and his position as are contained in this prospectus, and the only inference I can draw from that is that they were left in absolute ignorance of the true state of the case. Further, I think that we must not in such a case lose sight of this, that it was the duty of the promoters to safeguard the interests of the persons who were invited to become shareholders in the company.

In these circumstances, without going into the evidence in

(1) 12 App. Cas. 671.

detail, I think the conclusion is inevitable that the promoters of this company have been guilty of a misfeasance in the nature of a breach of trust.

Then the only question which remains is whether it has been shewn that the Theatres Company have been damaged by the misfeasance. I think that has been proved, for the reasons which have been already given by my brethren. I will only add that in this respect it seems to me that the case is entirely distinguishable from *Bentinck* v. *Fenn* (1), upon which Mr. Macnaghten naturally relied. And the great distinction is this. In the present case the contract between Rands, of the one part, and Carter, of the other, as a trustee for the Theatres Company, was not a real contract. Rands and Carter were alike nominees of the promoting company, whereas in *Bentinck* v. *Fenn* (1) a real contract was entered into between a real vendor and a trustee on behalf of the company, and, when Lord Herschell's speech in that case is read carefully, it will, I think, be found that he felt bound to come to the conclusion that a real contract had been entered into between these parties, and that that in itself was some evidence of the value at the time. Here I think we are entitled, indeed bound, entirely to disregard the nominal value which is fixed by the so-called contract of February 1, 1897, between these two nominees of the Finance Company.

For these reasons I think the appeal fails.

VAUGHAN WILLIAMS L.J. We are all of opinion that the true measure of the damages is the amount of the profit which was made by the promoting company. If necessary, there must be an inquiry to ascertain that amount.

[After some discussion it was arranged that there should be judgment against the Finance Company for 12,000*l.*, without interest, the Finance Company paying the costs in both Courts, and the liquidator of that company undertaking not to appeal to the House of Lords.]

Solicitors: *R. Raphael & Co.; G. B. W. Digby.*

(1) 12 App. Cas. 652.

W. L. C.

KEKEWICH J.

1902

Oct. 31.

In re ROBERTS. ROBERTS *v.* ROBERTS.

[1902 R. 1246.]

Administration—Marshalling Assets—Direction for Payment of Debts—Insufficiency of Personal Estate—Pecuniary Legatees and specific Devisees.

Where a will contains a general direction for payment of debts, and the personal estate is insufficient, pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate.

In re Bate, (1890) 43 Ch. D. 600, must on this point be treated as overruled.

In re Stokes, (1892) 67 L. T. 223, and *In re Salt*, [1895] 2 Ch. 203, followed.

Adjourned Summons.

Edmund Roberts of Rhodogudio, in the county of Anglesey, farmer, by his will dated May 26, 1902, after appointing the defendant William Roberts and the plaintiff Margaret Ann Roberts executors thereof, directed that all his just debts and funeral and testamentary expenses should be paid as soon as possible after his decease. The testator then made a specific bequest of farming stock of some value, and gave and bequeathed "the following pecuniary legacies, that was to say" to the defendant Ann Hughes 500*l.*, and to the defendant Eliza McKillop 200*l.*; and after bequeathing all the residue of his personal estate to his executors equally, the testator devised one farm to the defendant William Roberts and another farm to the defendant Owen Williams.

The testator died on June 2, 1902, and his will was duly proved by the executors thereof.

In addition to the real estate specifically devised, the testator was entitled to a small freehold farm, worth about 40*l.* or thereabouts, which had been sold.

The testator's general personal estate not specifically bequeathed and the real estate undisposed of by his will were insufficient for the payment of his debts and funeral and testamentary expenses, and accordingly the question arose whether the pecuniary legatees were entitled to have the assets

marshalled so as to stand in the place of creditors against the specifically devised real estate so far as the debts, funeral and testamentary expenses were paid out of the personalty.

The present summons was taken out for the determination (inter alia) of this question.

Method, for the plaintiff, said that the authorities on the point were not harmonious, and referred to *In re Salt* (1) as being the most recent decision on the subject, and favourable to the claim of the pecuniary legatees.

Mark Romer, for the defendants, the specific devisees of real estate. In *In re Bate* (2) Kay J. decided that, in a case in all substantial respects similar to the present one, the general legatees had no right of marshalling against the real estate. That case therefore, if it stood alone, would be an express and sufficient authority in favour of the specific devisees. But it must be admitted that recent decisions have thrown considerable doubt on the soundness of *In re Bate*. (2) It was carefully considered by Stirling J. in *In re Stokes* (3), and he declined to follow it, and gave a decision in favour of the right of marshalling; and Chitty J. in the case of *In re Salt* (1) followed the decision of Stirling J., and said that the reasoning on which that learned judge acted appeared to be entirely in accordance with the well-known doctrine of equity as to marshalling. In the case of *In re Butler* (4) your Lordship observed upon *In re Bate* (2), but the actual decision was upon a different point. In the last edition (6th) of Seton on Judgments, vol. ii. p. 1673, the cases are referred to, and it is stated that *In re Bate* (2) "must be treated as overruled." Under these circumstances difficulty is felt in resisting the claim of the pecuniary legatees to marshal.

Hon. Frank Russell, for the other defendants, the pecuniary legatees.

KEKEWICH J. The question which I have now to decide is whether, the personal estate of the testator having been taken to pay the debts and also the proceeds of sale of a small

(1) [1895] 2 Ch. 203.
(2) 43 Ch. D. 600.
(3) 67 L. T. 223.
(4) [1894] 3 Ch. 250.

KEKEWICH J. 1902 ROBERTS, *In re.* ROBERTS *v.* ROBERTS.

undisposed of real estate, the pecuniary legatees of 500*l.* and 200*l.* are entitled to marshal as against the specifically devised real estate—that is to say, to insist that as the personal estate has been taken to pay the debts, and the testator has charged the real estate with those debts, they, the legatees, are entitled as against the devisees to say, "You must make good, to the extent to which you can do it, the money which has been taken from us to pay debts." The question is one of great importance; but, on the authorities, it seems to me to be clear, and I should not say one word about it were it not for its importance, and because of the decision of Kay J. in *In re Bate* (1), which was carefully examined by Stirling J. in the case of *In re Stokes.* (2) I regret that that case was not reported in the *Law Reports.* We have, however, the decision of Chitty J. in *In re Salt* (3), in which he does not follow *In re Bate* (1), and refers to Stirling J. in *In re Stokes* (2) as having carefully considered all the authorities. I do not wish to refer to my own decision in *In re Butler* (4), except to make one supplementary remark. I referred there to the then last edition of Seton on Judgments. Since then there has been another (the 6th) edition of that work, which I have before me, and there, at vol. ii. pp. 1672, 1673, we have the advantage of a careful review of the authorities. I have looked at it, and it seems to me to sum up accurately the present position. Referring to the case of *In re Bate* (1), the editors say: "*In re Bate* (1) must on this point"—that is, the point as to marshalling—"be treated as overruled." I wish to add my authority, so far as I can, by way of sanctioning that. I think that *In re Bate* (1) must be treated as overruled. The decision of Chitty J., and the considered decision of Stirling J. which preceded it, are sufficient to justify me in so treating *In re Bate* (1); and, following the recognised rule of administration, it seems to me that here the doctrine of marshalling is applicable.

Solicitors: *Rowcliffes, Rawle & Co.*

(1) 43 Ch. D. 600.
(2) 67 L. T. 223.
(3) [1895] 2 Ch. 203.
(4) [1894] 3 Ch. 250.

C. C. M. D.

DOUGHTY *v.* LOMAGUNDA REEFS, LIMITED.

BUCKLEY J.

1902.

July 11.

[1902 D. 79.]

Company — Memorandum of Association — Reconstruction under Power in Memorandum—Sale of Assets for Shares in New Company—Resolutions contemporaneously passed for approval of Sale Agreement and for Voluntary Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

The memorandum of association of a company contained powers to sell its undertaking for shares in another company, and to distribute amongst its members in specie any of its property. Its articles of association empowered the liquidators in its winding-up, with the sanction of an extraordinary resolution, to distribute in specie amongst the contributories any part of its assets. The company while a going concern agreed to sell its undertaking and all its property to another company, the consideration being—(*a*) that the purchaser company should pay the vendor company's debts and perform its obligations, and keep the vendor company and its liquidators and contributories indemnified; (*b*) that the vendor company should retain a sum to pay the costs of and incidental to its winding-up; (*c*) the allotment to the vendor company or its nominees of fully paid shares in the purchaser company. The agreement was conditional on its being sanctioned by an extraordinary resolution of the vendor company before January 31, 1902.

On December 30, 1901, the vendor company passed by a three-fourths majority resolutions—(*a*) that the agreement should be adopted and carried into effect; (*b*) for voluntary winding-up and the appointment of a liquidator, who was authorized to distribute any of the assets amongst the members in specie. At a subsequent meeting resolution (*b*) was confirmed as a special resolution :—

Held, that the sale was properly made under the power of sale in the memorandum, and was not vitiated by the fact that it involved the company's immediately going into voluntary liquidation; and that it was not in disguise a sale by the liquidator upon terms not justified by s. 161 of the Companies Act, 1862.

Cotton v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, followed and explained.

Payne v. *Cork Co.*, [1900] 1 Ch. 308, distinguished.

Clause 3 of the memorandum of association of the defendant company stated that its objects were (inter alia): "(*n*) To sell or dispose of the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares, debentures, debenture stock, or

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securities of any other company having objects altogether or in part similar to those of this company"; and "(v) To distribute among the members in specie any property or any proceeds of sale or disposal of any property of the company, and for such purpose to distinguish and separate capital from profits, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law."

Clause 164 of the articles of association provided as follows: "If the company shall be wound up, the liquidators (whether voluntary or official) may, with the sanction of an extraordinary resolution, distribute in specie among the contributories any part of the assets of the company, and in particular any shares, stocks, or debentures of any other company which this company may be entitled to . . . ." By an agreement dated November 12, 1901, it was agreed—(1.) That the defendant company (which was then a going concern) should sell to the Lomagunda Development Company, Limited, all the undertaking and property of the plaintiff company. (2.) That, as part of the consideration for the sale, the purchaser company should pay and discharge the debts and liabilities of and perform the contracts binding on the vendor company (and respectively mentioned in a schedule to the agreement), and keep the vendor company indemnified. (3.) That the vendor company should retain out of the property and assets 200*l.* to defray the costs and expenses of and incident to the agreement and the winding-up of the vendor company, and should hand over to the purchaser company on the dissolution of the vendor company any balance, and that, if the 200*l.* should be insufficient to defray the costs and expenses, the deficiency, up to 100*l.*, should be paid by the purchaser company. (4.) That as the residue of the consideration the purchaser company should "allot to the vendor company or its nominee or nominees 17,092 fully paid shares of 1*l.* each of the purchaser company, to be numbered 200,001 to 217,092 inclusive."

By clause 9 the agreement was declared to be conditional upon the same being sanctioned on or before January 31, 1902, by an extraordinary resolution of the vendor company.

At a meeting of the shareholders of the vendor company held on December 30, 1901, the following resolutions were duly passed: "(1.) That the conditional agreement submitted to this meeting [date and parties stated] be and the same is hereby approved and adopted, and that the directors be and they are hereby authorized to carry the same into effect with such (if any) modifications as they may think fit to assent to. (2.) That this company may be wound up voluntarily, and that Mr. L. Hasluck, of, &c., be and he is hereby appointed liquidator of the company for the purpose of such winding-up . . . . and that the liquidator be and he is hereby authorized to distribute any of the assets of this company amongst the members in specie, and to exercise all or any of his powers and authorities by attorney."

The second resolution was confirmed as a special resolution at a meeting held on January 15, 1902. Doughty brought an action on behalf of himself and the other shareholders of the defendant company, claiming—(1.) a declaration that the agreement was ultra vires of the company and was void; (2.) an injunction to restrain the company and its liquidator, officers, servants, and agents from carrying into effect or in any way further acting upon the agreement; (3.) alternatively, (*a*) a declaration that the company and its liquidator were not entitled to carry the agreement into effect without purchasing the interest of the plaintiff and other dissenting shareholders, and (*b*) an injunction to restrain the carrying out of the agreement without purchasing such interests accordingly.

The action was tried before Buckley J. on July 11, 1902.

G. F. Hart, for the plaintiff. What is proposed to be done is a scheme for winding-up voluntarily, and reconstructing in the winding-up on the terms of selling the undertaking for shares in another company without complying with the rights of shareholders under s. 161 of the Companies Act, 1862.

The defendants will rely on *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1); but that case is distinguishable. The report does not shew that the sale agreement

(1) [1892] 3 Ch. 454.

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provided for the sale being carried out in the winding-up, and the agreement was approved separately, the resolution for winding-up not being passed at the same meeting, but subsequently. Here the resolutions approving the agreement, and for voluntary winding-up, and for the distribution in specie are passed uno flatu.

The effect is that there is a scheme of reconstruction exactly the same as one carried out under s. 161 of the Act of 1862, but without the safeguards to shareholders provided by that section.

The company cannot by its articles, or anything done in pursuance of them, deprive members of the protection given by the section: *Payne* v. *Cork Co.* (1) [He also referred to *Griffith* v. *Paget.* (2)]

Astbury, K.C., and *J. W. M. Holmes*, for the defendant company. This case is governed by *Cotton* v. *Imperial and Foreign Agency and Investment Corporation.* (3) The fact that the resolution for winding-up was passed at the meeting at which the resolution approving the agreement was passed is immaterial. In the case cited, Chitty J. did not rely on the fact that winding-up did not take place till afterwards. This case, like that, is one of a sale under a valid power in the memorandum of association, and winding-up sooner or later is essential in order to distribute the assets. *Payne* v. *Cork Co.* (1) was a case of reconstruction under s. 161 of the Act of 1862, and not of sale under the memorandum of association, and it has no application to the present case. Stirling J. in that case (4) says that in *Cotton's Case* (3) the sale made "was not a sale in a winding-up, and that was the ground of the decision."

G. F. Hart, in reply.

BUCKLEY J. Those sections of the Companies Act, 1862, which specify what the memorandum of association shall contain provide, amongst other things, that the memorandum shall state "the objects for which the proposed company is to be established." If the matter were untouched by authority,

(1) [1900] 1 Ch. 308.
(2) (1877) 5 Ch. D. 894.
(3) [1892] 3 Ch. 454.
(4) [1900] 1 Ch. 318.

I think there would be ample room for argument that these words mean the objects which the company is established to carry out as a going concern for the purpose of earning profit and the like—what I may call the living objects of the company, objects which it is established to carry out as a living corporation—and do not include provisions addressed to the disposal of the assets of the company at a time when it is not going to carry on any undertaking further. But that, if I rightly read the judgment of Chitty J. in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1), is not an accurate statement of what the objects are to be. I think that he there meant to decide, and decided, that, under a clause in the memorandum of association which provides for the sale of the undertaking of the company, you may sell the undertaking of the company although you do not contemplate having any subsequent undertaking at all—the sale may be made at a date when the corporation as a working concern is to come to an end. Chitty J. was dealing with a case in which there was an agreement for the sale of the undertaking, and a contemporaneous proposal that the company should go into liquidation, and he treats it as a case in which the liquidation was contemplated as part of the scheme for the sale. It is true that the special resolutions for winding-up were negatived at the particular meeting at which the agreement was approved, and were not passed till afterwards; but I do not think he drew any distinction based upon that fact. He dealt with the case on this footing: that the power of sale contained in the memorandum of association was a good power exercisable even when it was intended that the sale should be the end of the corporate life, so far as earning profit was concerned. *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) was decided in the year 1892. I consider it as wholly and entirely binding upon me.

On the other hand, in *Payne* v. *Cork Co.* (2) Stirling J. decided that where the corporation is proceeding, not under the memorandum of association, but purports under clauses in the articles of association to authorize the liquidator to make an

(1) [1892] 3 Ch. 454. (2) [1900] 1 Ch. 308.

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agreement for a sale on terms which exclude s. 161, a sale so made by the liquidator is not good.

What I have to decide here, as it appears to me, really amounts to this—whether this is a sale properly made by the corporation under a clause contained in the memorandum of association, or whether it is in disguise a sale by a liquidator upon terms not justified having regard to s. 161 of the Companies Act, 1862.

The memorandum here contains in clause 3 (*n*) a power to sell the undertaking, or any part thereof, for, amongst other things, shares; and in clause 3 (*v*) a power to distribute amongst the members in specie any property of the company or any proceeds of sale, so that no distribution amounting to a reduction of capital be made except with the sanction, if any, for the time being required by law. Clause 164 of the articles of association provides that liquidators may, with the sanction of an extraordinary resolution, distribute in specie amongst the contributories any part of the assets of the company. Those being the powers, the agreement in question was entered into on November 12, 1901, by the company. The company had not gone into liquidation; but the agreement was for the sale of the undertaking and all the property of the company. The purchaser was to pay all the debts and perform all the contracts binding on the corporation, and to keep the vendor company and its liquidator and contributories indemnified against all those contracts; the vendors were to be entitled to keep 200*l.* out of the assets to defray the costs of the agreement, and of and incidental to the winding-up of the vendor company; and they were to hand over to the purchaser company on the dissolution of the vendor company any balance; and if the 200*l.* was insufficient, the deficiency was to be paid by the purchaser company up to 100*l.* The rest of the consideration consisted of 17,092 in fully paid shares of 1*l.* each of the purchaser company.

On December 30, 1901, that agreement, which is expressed to be conditional on the same being sanctioned by an extraordinary resolution of the company, was submitted and approved; and, by a second resolution passed on the same

day, it was resolved that the company should be wound up voluntarily, and that a liquidator should be appointed. The latter resolution was confirmed after the requisite interval.

Now, in that state of things, is this a sale under the memorandum of association, or is it in disguise a sale by the liquidator? It seems to me it must be the former. When the liquidator came into existence in January, 1902, it did not remain within his determination to say how the assets should be sold or for what or when. The company had become bound by that agreement to sell; the liquidator did not sell. It was, therefore, a sale by the company. Then, was it a sale which the company could properly make? It is unquestionably on the face of it, as would appear from what I have been reading, a sale which required that the company should go into liquidation. But was it a sale under a power in the memorandum of association? Chitty J. has decided that a sale made under a power in the memorandum of association is good. It is true that there are stipulations in the agreement in the present case which, as far as I can see, could not be thoroughly worked out except in a winding-up. The balance of the 200*l.* could not be ascertained until you had ascertained what the costs of the winding-up were. The deficiency to be supplied in case the 200*l.* was insufficient could not have been predetermined, and clause 2 contemplates that the liquidator and contributories should be relieved from all liability against contracts and debts, and so on. But does that make the sale any the less a sale by the company? I do not think it does. In point of fact the same transaction, without any of these objections, could have been carried out by putting it in a different form. If, instead of saying that the purchaser should pay the debts and indemnify the contributories against them, they had ascertained what the debts were, and said the purchaser should pay that amount; and if, instead of the stipulation as to the 200*l.*, they had stipulated that the purchaser should pay in cash a named sum calculated as being sufficient to cover the costs of liquidation, then the thing would not have been dependent on the liquidation in any way, and could have been carried out irrespective of it. I do not think there is any substantial

BUCKLEY J. 1902 DOUGHTY v. LOMAGUNDA REEFS, LIMITED.

difference between the two transactions. If, on the decision in *Cotton's Case* (1), it would have been competent to make the latter bargain, it seems to me it must be equally competent to make the former. After this company had executed this agreement, if it had not gone into liquidation the agreement would still, I apprehend, have been capable of being enforced against them. The company, who were the vendors, would not have been able to set up against the purchasers that the latter had, e.g., failed to pay the costs of the liquidation because there had been no liquidation.

I have hesitated about the case, because I have always felt a difficulty in grasping exactly the principle of *Cotton's Case* (1); and, being on that account the more anxious to give effect to what it seems to me to have decided, I may perhaps lean too much against the plaintiff. But I cannot help thinking that this case is governed in principle by *Cotton's Case* (1); and, that being so, I must dismiss the action with costs.

Solicitors for plaintiff: *Michael Abrahams, Sons & Co.*
Solicitors for defendant company: *Ingle, Holmes & Sons.*

(1) [1892] 3 Ch. 454.

F. E.

In re ANGLO-FRENCH EXPLORATION COMPANY.

BUCKLEY J.

1902

July 12, 19; Aug. 2.

[1902 A. 056.]

Company—Reduction of Capital—Cancellation of Paid-up Shares where Capital not lost or unrepresented by available Assets or repaid—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 9—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

In speaking of reduction of capital the word "capital" means neither nominal capital to the exclusion of paid-up capital, nor the latter to the exclusion of the former.

A reduction of nominal capital which is paid up must be so made as not to affect the equilibrium of the company's balance-sheet to the prejudice of the company's creditors. This equilibrium is not disturbed where the reduction is effected (*a*) by cancelling capital lost or unrepresented by available assets, or (*b*) by paying off capital in excess of the company's wants (in each case under s. 3 of the Companies Act, 1877), because in either case the balance item on the debit or credit side of the balance-sheet (as the case may be) is unaffected; but the section impliedly forbids the writing off of paid-up capital which is not lost or unrepresented by available assets or returned—the result in that case being to disturb the equilibrium of the balance-sheet by striking out of the debit or liability side a sum representing paid-up capital, leaving the credit or asset side unaffected.

A company had a nominal capital of 700,300*l.* divided into 1*l.* shares, of which 350,000 were preference, 350,000 ordinary, and 300 founders' shares. All the shares were fully paid up. The existence of founders' shares with special rights being found inconvenient, and it being estimated that each fully paid founders' share was worth 260 ordinary shares with a liability to pay 1*l.* per share thereon, the company agreed with persons purporting to contract on behalf of themselves and the other holders of founders' shares that the 300 founders' shares should be cancelled on the terms of each holder of those shares taking in lieu thereof 260 unpaid ordinary shares (in all 78,000), which were to be provided by increasing the capital of the company by at least 78,000*l.* The agreement was conditional—(1.) on its being ratified by the founders' shareholders and (2.) approved by the company in general meeting, and (3.) on the capital being increased as above mentioned (4.) on a special resolution being passed for reduction of capital by cancelling the founders' shares, and (5.) on the Court's sanction being obtained to the reduction.

Resolutions were then passed—(*a*) increasing the capital of the company to 1,000,300*l.* by creating 150,000 further ordinary shares and 150,000 further preference shares, (*b*) (special) for reducing the capital to

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1,000,000*l.* by cancelling the founders' shares, and (*c*) approving the agreement. All the holders of founders' shares ratified the agreement.

Before issuing any of the new 300,000 shares the company petitioned the Court for an order confirming the reduction of capital.

Buckley J. refused to confirm the reduction (as the debit in the balance-sheet in respect of paid-up capital would thereby be reduced by 300*l.*, whereas the amount was only to be recouped by something to be done after the confirmation), but pointed out that the object in view could be attained by other means, for the adoption of which he allowed the petition to stand over.

The holders of the founders' shares having been joined as co-petitioners, on its being alleged and proved that the 78,000 shares had been allotted to them, and that they had paid considerably more than 300*l.* to the company in respect of those shares, and that they claimed no beneficial right or interest in the founders' shares, but held them in trust for the company and desired to have them cancelled by the Court:—

Buckley J. confirmed the reduction.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, distinguished.

Form of minute approved by the Court.

THE Anglo-French Exploration Company, Limited, was incorporated in 1889 under the Companies Act, 1862, and at the date of the presentation of the petition below mentioned its nominal capital was 1,000,300*l.*, divided into 500,000 preference shares of 1*l.* each, 500,000 ordinary shares of 1*l.* each, and 300 founders' shares of 1*l.* each. Part of this nominal capital, namely, 150,000 of the preference shares and 150,000 of the ordinary shares, had been recently created but not issued. All the other shares had been issued and were fully paid up, and the paid-up capital was, therefore, 700,300*l.*

Clause 5 of the memorandum of association of the company provided as follows: "The profits of the company which it shall from time to time be determined to appropriate for dividend shall be applied first in payment or satisfaction of a cumulative dividend at the rate of 8 per cent. per annum on the capital paid up on the ordinary shares, and at such rate or rates, not exceeding the said rate, as may be attached to any shares created upon any increase of capital, and of the surplus 75 per cent shall be distributed by way of further dividend on the shares other than the founders' shares, and the remaining 25 per cent. shall be distributed among the holders of the

founders' shares in proportion to the founders' shares held by them respectively. In the event of a winding-up, the founders' shares shall confer the right to 25 per cent. of the surplus assets remaining after paying off the capital paid up on the other shares. Any shares created upon an increase of capital may be issued with any preferential, special, or qualified rights attached thereto, but so that the rights hereby attached to the founders' shares shall be in no way prejudiced or infringed."

Clause 42 of the articles of association provided that the company might by special resolution reduce its capital "by paying off capital, or cancelling capital which has been lost or is unrepresented by available assets, or reducing the liability on the shares or otherwise as may seem expedient."

By an agreement dated February 17, 1902, and made between Ernest George Mocatta and Louis Ochs, on behalf of themselves and all other the holders of founders' shares in the capital of the company, of the first part, the company of the second part, and William Henderson Clark, on behalf of the directors of the company, of the third part, after reciting that the nominal capital was then 700,300*l.* in 350,000 preference shares, 350,000 ordinary shares and 300 founders' shares, and that it was estimated that the relative values of the ordinary and founders' shares were such that each of the said founders' shares fully paid was equivalent to 260 ordinary shares with a liability to pay par, that is 260*l.*, and that it was deemed expedient that the said founders' shares should be cancelled and that the holders thereof should subscribe for and be allotted ordinary shares in the capital of the company upon the terms thereinafter set forth, and that for such purpose the capital of the company should be increased by the creation of 78,000 new ordinary shares of 1*l.* each, it was agreed as follows:—

"1. When this agreement becomes absolute the said Ernest George Mocatta and Louis Ochs, and each of the other holders of founders' shares aforesaid, who shall ratify this agreement (hereinafter referred to as a 'ratifying holder') shall (if he ratifies in the terms of Form 'A' annexed hereto) in respect of every founders' share held by him be deemed to apply for an allotment of 260 of the said new ordinary shares upon the footing and condition that he is to pay up the full nominal

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amount thereof on allotment, and the company shall allot the same accordingly without further application, and shall (if he ratifies in the terms of Form 'B' annexed hereto) in respect of every founders' share held by him be deemed to request an allotment to the directors of the company of 260 of the said new ordinary shares upon the footing that the allottees shall pay up the full amount thereof on allotment, and the company shall allot the same accordingly, and the directors shall be deemed to assent to such allotment, and shall in consideration thereof transfer or procure the transfer to such ratifying holder of 200 fully paid-up new ordinary shares in the company.

"2. The company is to be at liberty to pass a special resolution cancelling the founders' shares aforesaid, and to apply to the Court for an order confirming such cancellation, and the company shall convene the requisite meetings for the purpose, and the said Ernest George Mocatta, Louis Ochs, and each ratifying holder shall concur in the passing of such special resolution, and also a resolution for increasing the capital by the creation of the said 78,000 new ordinary shares of 1*l.* each.

"3. This agreement is conditional:—

"(1.) On its being ratified by all the holders of founders' shares aforesaid; and

"(2.) On its being approved by the company in general meeting; and

"(3.) On a resolution of a general meeting of the company being passed for the creation of 78,000 new ordinary shares of 1*l.* each at least; and

"(4.) On a special resolution being passed for the reduction of the capital by the cancellation of the said 300 founders' shares; and

"(5.) On the sanction of the Court being obtained to such reduction.

"And if all these conditions are not fulfilled within six calendar months from the date hereof, this agreement shall at the expiration of such period become void; and if all these conditions are fulfilled within the said period of six calendar months, then immediately on such fulfilment this agreement shall become absolute."

Form A was as follows: "To the Anglo-French Exploration Company, Limited.—Referring to your annexed circular, I beg to say I will accept an allotment of 260 ordinary shares for each founders' share I hold, paying for such ordinary shares at the rate of 1*l.* per share, and accordingly I ratify the agreement of the 17th February, 1902, referred to in your circular of the 22nd February, 1902. Dated this , 1902."

Form B was as follows: "To the Anglo-French Exploration Company, Limited.—Referring to your annexed circular, I beg to say I will accept an allotment of transfer of 200 fully paid ordinary shares for each founders' share I hold, and accordingly I ratify the agreement of the 17th February, 1902, referred to in your circular of the 22nd February, 1902. Dated this , 1902."

All the holders of founders' shares except those holding eight of them signed Form A, and the others signed Form B.

At an extraordinary general meeting held on March 27, 1902, the following resolution was carried unanimously: "That the capital of the company be increased to 1,000,300*l.* by the creation of 150,000 new ordinary shares of 1*l.* each and 150,000 new 6 per cent. preference shares of 1*l.* each."

Subsequently, but at the same meeting, the following resolution was passed unanimously: "That having regard to the conditional agreement [date and parties stated], the capital of the company be reduced from 1,000,300*l.* to 1,000,000*l.* by the cancellation of the whole of the 300 fully-paid founders' shares of 1*l.* each." The second resolution was confirmed as a special resolution at an extraordinary general meeting held on April 14, 1902.

The agreement was not only approved at the meeting of March 27, 1902, but was ratified in writing by all the directors and by all the holders of founders' shares.

A petition was presented by the company (intituled in the matters of the Companies Acts, 1867 and 1877) alleging the facts above stated, and that the capital had been increased by the creation of upwards of 78,000 new ordinary shares (i.e. 260 for each of the 300 founders' shares), and that the existence of the founders' shares with special rights and privileges attached

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thereto was disadvantageous to the company and detrimental to its interests, and that the terms on which the holders had assented to the cancellation thereof were fair and reasonable, and praying that the proposed reduction might be confirmed by the Court, and that the following minute might be approved:—

"The capital of the Anglo-French Exploration Company, Limited, is 1,000,000*l.*, divided into 500,000 preference shares of 1*l.* each and 500,000 ordinary shares of 1*l.* each, instead of the former capital of 1,000,300*l.* divided into the said preference and ordinary shares, and also 300 founders' shares of 1*l.* each, which have been cancelled. At the time of the registration of this minute 350,000 only of the said preference shares and 350,000 only of the said ordinary shares have been issued and are outstanding, and the same have been and are to be deemed fully paid up."

The petition came on for hearing before Buckley J. on July 12, 1902, and was unopposed.

Stewart-Smith, K.C., and *George Lawrence* (*W. E. Hollams* with them), for the petitioners. It is not intended to infringe the rule laid down in *Trevor* v. *Whitworth* (1); and *British and American Trustee and Finance Corporation* v. *Couper* (2) is an authority in favour of the applicants. The reduction is authorized by ss. 9 and 11 of the Companies Act, 1867, as extended to paid-up capital by s. 3 of the Companies Act, 1877, which is general in its application and not confined to the instances therein enumerated. Further capital being required, it became apparent that there would be difficulty to raise it, having regard to the anomalous privileges of the holders of the founders' shares, and the agreement of February 17 was therefore entered into.

[BUCKLEY J. This is not a reduction of capital, but parting with shares on the terms that others are acquired. He referred to *Bellerby* v. *Rowland and Marwood's Steamship Co.* (3) and *Teasdale's Case.* (4)]

(1) (1887) 12 App. Cas. 409.
(2) [1894] A. C. 399.
(3) Ante, p. 14.
(4) (1873) L. R. 9 Ch. 54.

The observations of Cozens-Hardy L.J., with reference to surrenders of shares, in the former case are in our favour.

[BUCKLEY J. If the company was going to repay money to shareholders, I could understand that the case came within the Act of 1877.]

A reduction by extinguishment of shares is within that Act although nothing is repaid to the holders of the extinguished shares. The Court is in this case only asked to confirm a reduction effected by cancellation of shares with the consent of the holders. They will get something for giving that consent, and the Court must be told what it is in order that it may be satisfied that the consideration is not illegal.

[They also referred to the unreported decisions of Stirling J., confirming reductions of capital, in *In re Westminster Electric Supply Corporation* (1) and *In re St. James' and Pall Mall Electric Light Co.* (2), and to the unreported decision of Romer J. in *In re House to House Electric Supply Co.* (3)]

Cur. adv. vult.

July 19. BUCKLEY J. The question to be determined on this petition is whether, under the Companies Acts, 1867 and 1877, a company limited by shares can reduce its nominal capital and its paid-up capital by cancelling (with the consent of their holders) paid-up shares to a certain amount where neither has that amount been lost, nor is it unrepresented by available assets, nor is it to be paid off as in excess of the wants of the company. The petitioners, who contend for the affirmative of this proposition, say that, inasmuch as such a reduction might be made if the amount paid up were returned to the shareholders, the question cannot be affected by the fact that they are content to surrender the shares without asking payment. The reply would seem to be that if the proposition be true the Court has for the last quarter of a century or more been wasting its time in requiring evidence that capital has been lost, unless it can be maintained (which it cannot) that the evidence has been required, not for the protection of

(1) (August, 1897). (2) (1899).
(3) (1898).

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creditors, but to enable a majority of the corporators to bind a minority. For if the proposition be true, it is immaterial whether the capital has been lost or not—it is sufficient to shew that the shareholder is content to release all right in respect of the amount paid.

In speaking of reduction of capital the word "capital" must be understood as meaning neither nominal capital to the exclusion of paid-up capital nor the latter to the exclusion of the former. The nominal capital (A) of every company limited by shares (that is to say, the amount stated in the memorandum of association or as modified by subsequent increase) must always be represented by (B) capital called and paid upon shares issued, and (C) capital uncalled upon shares issued, and (D) the amount of unissued shares, or by some one or more of those. Every reduction of capital must reduce (A)—that is, the nominal capital—and must reduce some one or more or all of (B), (C), and (D).

The key to the solution of all questions as to reduction of capital lies in remembering that the corporation owes a duty, not to its shareholders only, but to its creditors also. It is unnecessary to attempt to express accurately and exhaustively for the purposes of this judgment what the rights of the creditors are. I shall not be misunderstood if I state quite shortly that their rights are to insist that neither paid-up capital (B), nor uncalled capital (C), shall be reduced without provision being made for the debts due to them or the protection which the Acts provide being extended to them. Their rights are founded upon the fact that capital paid up can, except as permitted by the Acts, be applied only for capital purposes, and that uncalled capital can only be reduced by proceedings under the Acts. If the reduction be by reducing (A) and (D), or, in other words, by the cancellation of unissued shares, this may be effected without coming to the Court at all: Companies Act, 1877, s. 5. To such a case the provisions of the Act of 1867 do not apply. The statute excludes this case, because unissued capital is a thing to which the creditor has no right to look. If the reduction be effected by reducing (A) and (C), the case is governed by the Act of 1867, and the creditors

must be provided for or their consent obtained. The question is, What are the rights in the remaining case—namely, where the reduction is made by reducing (A) and (B)—by reducing, that is, nominal capital and paid-up capital?

The answer, in my judgment, is that the reduction must in this case be so made as not to affect the equilibrium of the balance-sheet to the prejudice of the creditor. On the liability side of the balance-sheet will be found, amongst other things, the amount of capital paid up by shareholders upon their shares. This is an amount in respect of which the creditor has certain rights. It must not be used except for capital purposes. On the other side will be found the assets of the company. Where capital is written off as lost or unrepresented by available assets, the equilibrium of the balance-sheet is maintained by striking out on the one side a certain amount from the paid-up capital, and on the other side a certain amount from the value of the assets. Where capital is returned as in excess of the wants of the company, an amount is in the same manner taken off from both sides of the balance-sheet. The balance item on the debit or credit side of the balance-sheet, as the case may be, is in either case unaffected. But if the proposition for which the petitioners contend were true, the result would be to strike out a sum on the liability side from the amount representing paid-up capital, leaving the asset side unaffected. The balance item in the balance-sheet would thus be altered by a further credit sum. I do not stay to analyze the question whether this additional sum would then become divisible in dividend. In some instances it would; in others it would not. A principal purpose of the Act in allowing reduction by cancelling lost capital is to enable a company to resume payment of dividend, when without reduction it could not legally do so before making up the loss. In my judgment the Act of 1877, by specifically giving power to cancel lost capital or to return paid-up capital, impliedly forbids the writing off of capital which is neither lost nor returned. If this is not its effect, then I fail to see why the Court should ever require evidence of loss, for by the hypothesis the consent of the shareholder to release a part of his paid-up capital would

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be sufficient. *British and American Trustee and Finance Corporation* v. *Couper* (1) was cited by the petitioners as an authority in favour of their contention. It does not help them. That case decided, not that every reduction is valid as between the corporation and its creditors, but that, assuming a reduction valid as between the corporation and its creditors, the incidence of the reduction may, as between the corporators, be thrown upon them in any manner which, having regard to their contractual relations inter se, the Court finds to be just.

In the present case the amount proposed to be written off without being returned is in the circumstances of this company a quite trivial sum—namely, 300*l.* But the principle is the same as if it were 300,000*l.* If 300,000*l.* were written off on the liability side, the result would be that the obligation of the company to keep capital assets to an amount sufficient to balance the capital paid up would be diminished by 300,000*l.*, and the rights of creditors would be affected.

The object here in view can in my opinion be attained, but not in the way that has been adopted in this case. Suppose there be a holder of a 5*l.* founders' share with some extraordinary rights of dividend which it is desired to terminate. If that holder is minded to put that 5*l.* paid-up share at the disposal of the company as a share, all rights in respect of which he releases, upon the terms that he shall simultaneously take an ordinary share and pay 5*l.* upon it, the equilibrium of the balance-sheet is not disturbed in such a manner as to reduce the figure which measures the right of the creditor to say that capital assets shall be applied only for capital purposes. In such case the amount owing in respect of capital remains the same as before. It is true that the asset side is increased by the new 5*l.* which the man pays, and that when the founders' share is cancelled the balance item will be increased by 5*l.* to credit, but the creditor is not thereby affected to his prejudice. The amount of the debit in respect of paid-up capital is not less than before, and the obligation of the company not to part with capital assets so as to have less than that amount is not reduced. The point is that the amount of

(1) [1894] A. C. 399.

capital assets which as between itself and its creditors the company must not, except by loss—must not by payment to its corporators—reduce below the amount of its paid-up capital is the same as before, and the rights of creditors are unaffected. This is a course which has been adopted and upon which orders of the Court have been successfully sought and obtained. I have been referred to two cases (both unreported) in which this was done—namely, *Westminster Electric Supply Corporation*, in August, 1897, and *St. James' and Pall Mall Electric Light Co.*, in 1899, both before Stirling J. The course there taken was, shortly, that the holders of the founders' shares took up further capital to an amount in excess of the amount of the founders' shares, and transferred their fully paid founders' shares to trustees for the company. The effect of this in substance was that the item in the balance-sheet of paid-up capital was not reduced, but the founders' shares became again shares in the dominion of the company, and in respect of which no corporator had any rights. For the present purpose those shares stood in a like position to shares which had not been taken or agreed to be taken by any person: see s. 5 of the Companies Act, 1877. They were not in fact shares within that section, but they were shares upon which no corporator had any rights. Their cancellation was made with the consent of the shareholders who formerly held but had voluntarily released them, and did not diminish the amount of the capital assets to which the creditor had a right to look for payment of his debt, because other shares to a like (or greater) amount had been taken in their stead.

The scheme in the present case does not take that form. The agreement to take the new shares is conditional upon and does not take effect until after the reduction has been made: see arts. 3 and 1 of the agreement of February 17, 1902. The resolution is to reduce, not after the new shares have been taken, but on the footing of an agreement which is, and in the resolution is described as, conditional. The minute to be approved is one in which the shares issued and paid up are less by 300*l.* than they were before. If I were to make the order asked, the debit in the balance-sheet in respect of paid-up

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capital would be reduced by 300*l.*, and the amount is only to be brought up to, or rather to an amount in excess of, the previously existing debit by something which is to be done thereafter. In my judgment this is not within the Act, and, although the amount is here very small, still, if the parties are not willing to carry through the matter at their own risk, but come for an order of the Court, they must, I think, put their proceedings in such form as that the Court can make the order.

I may add that I think they are amply justified in not carrying through the matter at their own risk, though the amount is small. I say so, not because I intend to express an opinion that, if the founders' shares were so transferred to trustees for the company and replaced by new shares taken, the company could not legally accept a surrender of them, but because, the principal purpose of the whole matter being, no doubt, to get rid finally and for ever of the founders' shares with their inconvenient rights, it is best to do so under an order of the Court.

As the matter stands, therefore, I think the petitioners have not brought themselves within the Act, and that under existing circumstances I should have to dismiss the petition. But I think the parties can so vary the circumstances as to put the Court in a position to make an order. If the 78,000 shares were applied for, allotted, and paid for, and the holders of the founders' shares transferred the latter to trustees for the company, or declared themselves trustees for the company of those shares, the petition could be so amended as to lead to a minute by which the paid-up capital would be shewn to be not less but greater than before. I should not, I think, be doing violence to the special resolution for reduction if in that state of facts I were to make an order. As regards the declaration by the founders that they claim no rights in respect of the founders' shares, but hold them at the disposal of the company, I think I could act upon a consent given by counsel appearing for all the founders upon the further hearing of the petition, and the order could be so worded as to give effect to that. Under these circumstances I will, if the petitioners so desire, allow the petition to stand over for a fortnight, with liberty to amend.

On the petitioners' application the petition stood over.

The petition was amended by adding all the holders of founders' shares as co-petitioners with the company; by stating the amount and mode of division of the nominal capital of the company prior to the date of the conditional agreement, namely, 700,300*l.* divided into 350,000 preference shares of 1*l.* each, 350,000 ordinary shares of 1*l.* each, and 300 founders' shares of 1*l.* each; and by stating that all the above-issued shares had been fully paid up, and that the paid-up capital was 700,300*l.*; and by stating that the petitioners other than the company were the registered holders of all the founders' shares. The following new clause was also inserted in the petition: "The 78,000 new ordinary shares referred to in the said agreement have already been allotted and issued to your petitioners (other than the company) or their nominees in accordance with the said agreement, and the sum of 77,220*l.* has been paid up thereon in cash. The balance of the sum of 78,000*l.* payable on the said last-mentioned shares is by the terms and conditions of the allotment and issue thereof presently due and payable to the company. By reason of the issue of such shares [and the payments thereon as aforesaid] the issued capital of the company (which was prior to the reduction effected by the said special resolution 700,300*l.*) will on such reduction being sanctioned by this Honourable Court be 778,000*l.*, and [statement as to the amount of paid-up and previously paid-up capital]. Your petitioners other than the company now claim to have no beneficial right or interest whatsoever in the said founders' shares (as they do hereby declare), and admit that they hold the same upon trust for the company absolutely, and your petitioners desire that the same may be cancelled by this Honourable Court." The statements in or referred to in square brackets were inserted by direction of the Court when the petition again came on for hearing on August 2, 1902.

Aug. 2. *Stewart-Smith, K.C.* The petition has been amended, and the holders of the founders' shares have been

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joined as petitioners. The 78,000 shares have been allotted to the holders of founders' shares, and all of them have been fully paid except 780, for which the holder of three founders' shares, who is abroad, is liable in the sum of 780*l.* That sum is on the way to the company. I ask that the reduction may be confirmed, and that, inasmuch as the petition was filed on May 8, 1902, the Court will not require the words "and reduced" to be further used as part of the company's name.

BUCKLEY J. Subject to the amendments in the petition being made, I confirm the reduction; and as the reduction of capital is a small one and leads in fact to a large increase of capital, the use of the words "and reduced" may be discontinued.

The following minute was approved by the Court:—

"The capital of the Anglo-French Exploration Company, Limited, is 1,000,000*l.*, divided into 500,000 preference shares of 1*l.* each, Nos. 1 to 500,000, both inclusive, and 500,000 ordinary shares of 1*l.* each, Nos. 1 to 500,000, both inclusive, instead of the former capital of 1,000,300*l.*, divided into the said preference and ordinary shares, and also 300 founders' shares of 1*l.* each, which have been cancelled. At the time of the registration of this minute 350,000 only of the said preference shares, Nos. 1 to 350,000, both inclusive, and 428,000 only of the said ordinary shares, namely, Nos. 1 to 428,000, both inclusive, have been issued and are outstanding. All the said 350,000 preference shares have been and are to be deemed to be fully paid up. Of the said 428,000 ordinary shares 427,220 shares, Nos. 1 to 359,360, both inclusive, and Nos. 360,141 to 428,000, both inclusive, have been and are to be deemed to be fully paid up, and on the remaining 780 thereof, Nos. 359,361 to 360,140, both inclusive, no amount has been or is to be deemed to be paid."

Solicitors: *Hollams, Sons, Coward & Hawksley.*

F. E.

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July 24, 25; Aug. 2.

In re LOVERIDGE. DRAYTON *v.* LOVERIDGE.

[1900 L. 664.]

Mortgage—Freeholds—Mortgagee in Possession—Equity of Redemption barred by Lapse of Time—Intestacy of Mortgagee—Devolution of Mortgaged Land—Realty or Personalty.

Where a mortgagee of freeholds enters into possession of the mortgaged land, and dies, leaving all his property to his widow for life but otherwise intestate, and the possession is continued by the widow, who is not solely entitled to the mortgage debt, until the equity of redemption is barred by the Real Property Limitation Act, 1874, the mortgaged land passes as personalty to his next of kin.

James Loveridge, the testator in this cause, died on December 28, 1864, having by his will dated February 7, 1863, devised and bequeathed his residuary real and personal estate to his wife during widowhood subject to certain annuities. Subject to those gifts he died intestate. He appointed his wife executrix, and she proved the will in 1865. The testator was entitled to a mortgage debt of 1075*l.* secured upon certain freehold messuages and lands by a mortgage in the form of a trust for sale dated May 26, 1831. In 1861 he went into possession of the mortgaged premises, and remained in possession till his death in December, 1864. After his death his widow, who did not marry again, went into possession, and so remained until her death on February 15, 1900. She was therefore tenant for life from 1864 to 1900. The testator had no children, and the persons entitled under the Statutes of Distribution to his personal estate at the time of his death were his widow and his brother Isaac Loveridge, who was also his heir-at-law. Isaac Loveridge died intestate in 1880, leaving as his legal personal representative Mrs. Pearce, and as his co-heiresses Mrs. Arnopp and Mrs. Ames. The plaintiff Mrs. Drayton was executrix of the testator's widow, and was now his legal personal representative. An order for the administration of the testator's estate was made on May 7, 1900, and a

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certificate was filed on April 22, 1902. The certificate reserved the question whether the mortgage debt and the land comprised in the mortgage remained of the nature of personalty, or whether the possession of the mortgaged property was to be treated as making it realty; and this question now came on for determination on further consideration.

H. Charlton Hawkins, for Mrs. Drayton. Subject to her own life interest, the testator's widow was entitled to half the testator's personal estate as to which he died intestate. The land on which the mortgage debt was secured did not pass to the testator's heir-at-law as realty, but was included in that personal estate, and she was entitled to half of it. It is not contended that the fact that the mortgage was in the form of a trust for sale effected an absolute conversion of the land into personalty, but that the title of the mortgagor had come to an end, and that the land must be treated as personalty of the testator. It is necessary to consider what was the nature of the property at the date of the testator's death: Williams on Executors, 9th ed. vol. i. p. 602. At that time he had only a mortgage on the property, and his interest in the land was personalty. If a mortgagee dies and his legal personal representative subsequently forecloses, the security devolves as personalty: Robbins on Mortgages, vol. ii. p. 852; *Canning* v. *Hicks* (1); *Tabor* v. *Grover*. (2) At all events we are entitled to a charge on the land for the amount of the mortgage debt and interest: *Awdley* v. *Awdley*. (3)

H. F. F. Greenland, for the next of kin of Isaac Loveridge. The mortgaged land must be treated as personalty, and the other half of it belongs to us. The estate of the mortgagee is personal estate until the equity of redemption has come to an end; and the heir-at-law takes the mortgaged land only as trustee for the legal personal representatives: *Earl of Carlisle* v. *Gober* (4); *Ellis* v. *Guavas*. (5) There is no authority precisely on the point, but there is a dictum by Lord Eldon in *Attorney-*

(1) (1686) 1 Vern. 412.
(2) (1699) 2 Vern. 367.
(3) (1690) 2 Vern. 192.
(4) (1659) Nels. 52.
(5) (1680) 2 Ch. Cas. 50.

General v. *Vigor*. (1) He says: "where a person dies entitled to a mortgage interest, that is personal estate at that time; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real." The facts in that case are stated in *Attorney-General* v. *Bowyer* (2); *Attorney-General* v. *Bowyer*. (3) The same view was taken in *Flack* v. *Longmate* (4), which was a question of dower. We adopt the argument which has been advanced on behalf of the widow's estate.

Fossett Lock, for the co-heiresses. We are entitled to the mortgaged land as realty. When a mortgagee enters into possession, he declares as against the mortgagor his intention to take the land as land, subject to its being reconverted into personalty by redemption. If being a mortgagee he devises the security as realty, it will pass as realty. It is a question of intention on the part of the person who takes possession: *Noys* v. *Mordaunt*. (5) If a mortgagee devises a mortgage, of which he has obtained foreclosure nisi, by the name of real estate, the land is real estate as between devisor and devisee: *Garret* v. *Evers*. (6) Lands originally held by old mortgages pass by a general devise, although no release of the equity of redemption appears: *Attorney-General* v. *Bowyer*. (2) There is no equity between the heir or the devisee and the legal personal representative to convert property from the state in which it is found at the death of the mortgagee: *Attorney-General* v. *Bowyer*. (3)

In this case the conversion into realty by the operation of the Real Property Limitation Act, 1874, related back to the date when possession was taken. A sale under the trust for sale contained in the mortgage would not alter the nature of the property: *In re Alison*. (7) The only decision on this point is *In re Woodhead* (8), in which Bacon V.-C. held in

(1) (1803) 8 Ves. 256, 277.
(2) (1798) 3 Ves. 714; 4 R. R. 132.
(3) (1800) 5 Ves. 303.
(4) (1845) 8 Beav. 420.
(5) (1706) 2 Vern. 581, 582.
(6) (1730) Mos. 364.
(7) (1879) 11 Ch. D. 284.
(8) W. N. (1884) 174.

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circumstances similar to these that the balance of the proceeds of sale of mortgaged property, after payment of the mortgage debt and interest to the personal representative, belonged to the heir. In *Flack* v. *Longmate* (1) it was not shewn that the land belonged to the mortgagee for an estate of inheritance at the time of his death.

No doubt the money secured belonged to the personal representatives: *Thornbrough* v. *Baker* (2); *Winne* v. *Littleton.* (3) But in this case the co-heiresses are entitled to the land because of the events which happened after the testator's death. The widow was the only person interested in shewing that the land was personalty, and yet she treated it as realty, and never suggested that after her death her estate would be entitled to half of it. At least the co-heiresses are entitled to the land subject to the mortgage: *Clerkson* v. *Bowyer.* (4)

H. F. F. Greenland, in reply. *Clerkson* v. *Bowyer* (4) does not decide that the personal representatives cannot take the land. The heir foreclosed and was declared to be a trustee for the executor, but that he was entitled to pay off the debt and keep the land if he liked. In the present case the heir could not have foreclosed, inasmuch as the mortgage was by trust for sale. *In re Woodhead* (5) must have been decided on the construction of the will. *Ellis* v. *Guavas* (6) has always been treated as a decision that the personal representative takes the whole land, not a charge merely: Powell on Mortgages, 6th ed. 665 a; Bacon's Abridgment, 7th ed. vol. v. p. 660.

Cur. adv. vult.

Aug. 2. BUCKLEY J. read a judgment, in which, after stating the facts, he continued:—The plaintiff does not argue that the possession of the widow was on her own behalf. The mortgage was by way of trust for sale, but no contention is raised by the plaintiff on that ground: see *In re Alison.* (7) The whole

(1) 8 Beav. 420.
(2) (1676) 1 Ch. Cas. 283.
(3) (1681) 2 Ch. Cas. 51.
(4) (1688) 2 Vern. 66.
(5) W. N. (1884) 174.
(6) 2 Ch. Cas. 50.
(7) 11 Ch. D. 284.

question to be determined is whether, after possession for three years by the testator followed by possession by the widow, the property is, for purposes of devolution from the testator, to be treated as realty or personalty.

Regarding this matter upon principle, it seems to me that the property is for purposes of devolution to be treated as personalty. The testator at the time of his death was entitled to the mortgage debt, which was personalty, and as security for that the land was vested in him subject to redemption. The estate in the land descended to the heir; but at the moment of the testator's death the heir was, as it appears to me, only a trustee for the legal personal representative, who was entitled to the debt and to the beneficial interest in the land in respect of the debt. After the lapse of many years the equity of redemption became barred, and the estate of the heir was no longer subject to redemption. But I see no reason why the estate of the heir, of which he was up to that time trustee for the legal personal representative, became at that date or at any time his property. Some one at the testator's death became entitled to this property. Unquestionably as regards the mortgage debt that person was the legal personal representative. The right against the land by way of security was the property of that same person, and, although at a later date the rights in respect of the land became enlarged from rights subject to redemption to rights freed from redemption, that can have no effect in discharging the legal owner of the land from his trusteeship for the owner of the debt.

Passing to authority, I find that in *Attorney-General* v. *Vigor* (1) Lord Eldon says this: "Where a person dies entitled to a mortgage interest, that is personal estate at that time; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real: but the person taking it as real would be a trustee for the persons entitled to it at the death of the testator, such as it was. But if that person, alone entitled at the death of the testator, remains in possession in the same manner as his ancestor was, without any act as

(1) 8 Ves. 256, 277.

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DRAYTON *v.* LOVERIDGE.

between him and the mortgagor, there being a clear option in a question with himself to determine, whether it shall be real or personal estate, if he lets it become real, no one has a right to say, it shall be personal." The former sentence of the above exactly fits, as it seems to me, the present case. The latter means, I think (applying it to the facts of the case before me), that if the widow had alone been entitled at the testator's death to the mortgage debt (which she was not, for the brother Isaac was entitled to a moiety), then for purposes of devolution from her the property would have been realty. Again, *Flack* v. *Longmate* (1) seems to me to be a clear decision in favour of my view. In that case interest upon the mortgage had been paid down to 1816. Flack died in 1830, so that the mortgagor's claim was not barred at his death. His widow claimed dower out of the estate. It was held that she was not entitled to dower. Lord Langdale said that it was necessary to consider what estate the husband had at the time of his death, that in order to consider whether the widow was dowable it was necessary to look at the matter as it stood at the husband's death and not at subsequent events. He concludes his judgment by saying: "It may appear that nobody is entitled to redeem; but did this state of things exist at the death of the husband? Though the husband might have considered it as his own at his death, and though I may not now consider it subject to any claim to redemption, yet the quality of the estate, in the consideration of this Court, at the decease of the husband, was not such as to give a right to dower." I can see no distinction for the present purpose between a case in which the question is whether the beneficial interest in the property descends upon the heir and a case where the question is whether the widow is entitled to dower. For the proposition that the heir is trustee for the legal personal representatives, the cases of *Ellis* v. *Guavas* (2), *Clerkson* v. *Bowyer* (3), and *Awdley* v. *Awdley* (4) are authorities. In *Ellis* v. *Guavas* (2) "administrator of a mortgagor" is, I think, in the second line a misprint for "administrator of a mortgagee." The case is not intelligible

(1) 8 Beav. 420, 424.
(2) 2 Ch. Cas. 50.
(3) 2 Vern. 66.
(4) 2 Vern. 192.

without that alteration. And the matter is made plain, I think, seven lines down by the passage, "the land shall go to the administrator because the money would have gone to her." The administrator in that connection can only be the administrator of the mortgagee to whom the money would be payable.

But then it is said that where the equity of redemption is released or foreclosed, or the estate becomes irredeemable after the testator's death, the heir may be entitled to pay off the mortgage debt to the personal estate and retain the land. For this there was cited a case before Bacon V.-C. of *In re Woodhead.* (1) The rule used to be that cases ought not to be cited from the *Weekly Notes,* and I think in this instance at least the rule is deserving of observance. The reasoning of the Vice-Chancellor is not given, and the note is not easy to follow. The one thing which does appear is that no authorities were cited. It may be that the decision rested upon the fact that there was a devise of mortgage estates, and that it was to persons other than those to whom the residuary real and personal estate were given. However this may be, I do not think that the note of that case can prevail as against the authorities to which I have referred.

I hold, therefore, that this property devolved upon the legal personal representative as personalty.

Solicitors: *Bridgman & Willcocks, for Hillman & Bond, Lyme Regis.*

(1) W. N. (1884) 174.

H. C. R.

Distinguished. In re YOUNG, DECD. [1951] 1 Ch. 344

Distinguished. Re YOUNG (decd.). [1950] 2 All E.R. 1245.

JOYCE J.

1902

July 9, 10, 15.

In re HETLEY.

HETLEY *v.* HETLEY.

[1902 H. 1468.]

Will—Construction—Gift for Life with Direction to dispose of Estate according to verbally expressed Wishes—Parol Evidence—Admissibility—Avoidance of Gift for Uncertainty.

Testator by his will appointed his wife sole executrix, and gave her his property for life. He then desired and empowered her by her will or in her lifetime to dispose of his estate "in accordance with my wishes verbally expressed by me to her":—

Held, that parol evidence could not be admitted to shew what the testator's verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty.

In re Fleetwood, (1880) 15 Ch. D. 594, distinguished.

ADJOURNED SUMMONS.

The testator by his will dated December 3, 1897, appointed his wife to be his sole executrix, and then declared as follows: "I give, devise, and bequeath to her all my real and personal estate whatsoever and wheresoever for her use, enjoyment, and benefit during her life. And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her."

The testator died on March 13, 1902.

This was an originating summons taken out by the widow for the determination of the question whether she was entitled absolutely or only for life, and whether, in the event of her being only entitled to a life interest, the property was, subject to her interest, undisposed of.

Evidence was filed by the widow to the effect that on many occasions prior to February, 1897, the testator conversed with her as to the disposal of his property, and told her what were his wishes with regard to it. He did not, however, mention the subject to her after February, 1897, when he finally and definitely expressed his wishes, and she made a memorandum of them and promised to carry them out.

H. Greenwood, for the widow. Parol evidence is admissible to shew what the testator's wishes were: *Moss* v. *Cooper* (1); *In re Huxtable* (2); *In re Fleetwood* (3); *Riordan* v. *Banon* (4); *In the Goods of Marchant.* (5)

[JOYCE J. referred to *Scott* v. *Brownrigg.* (6)]

There is a difference between an attempt to make an unattested codicil and a case of this sort: *In re Boyes.* (7)

The Court will carry out the testator's wishes in such a case as this, and construe the gift as absolute: *Lambe* v. *Eames* (8); *In re Hutchinson and Tenant* (9); *Mussoorie Bank* v. *Raynor* (10); *In re Adams and Kensington Vestry* (11); *In re Williams.* (12)

Hughes, K.C., and *G. Henderson*, for persons taking under the power of disposition. There is a binding trust on the widow to carry out the testator's wishes. Where a testator's wishes are communicated to a legatee before the date of the will and the legatee has promised to carry them out, a trust is created binding upon the legatee: *In re Stead.* (13) *In re Fleetwood* (3) is an authority that parol evidence is admissible to shew what the trust is. Farwell J. in *In re Huxtable* (2) recognised the authority of that case.

This case is covered by the principles laid down in *In re Boyes* (7): see also *McCormick* v. *Grogan.* (14)

R. J. Parker, for the heir-at-law and next of kin. There is here a gift of the beneficial interest to the widow for life, with a superadded power of disposing of the beneficial interest after her death. If there is a trust at all, it arises by implication in default of exercise of the power. But it is submitted that there is here no trust by implication; it is a bare power: *In re Weekes' Settlement.* (15) There is no trust, but a gift of a beneficial interest with power to appoint to an undefined class, and to

(1) (1861) 1 J. & H. 352.
(2) [1902] 1 Ch. 214; since reversed, ante, p. 793.
(3) 15 Ch. D. 594.
(4) (1876) I. R. 10 Eq. 469.
(5) [1893] P. 254.
(6) (1881) 9 L. R. Ir. 246.
(7) (1884) 26 Ch. D. 531.
(8) (1871) L. R. 6 Ch. 597.
(9) (1878) 8 Ch. D. 540.
(10) (1882) 7 App. Cas. 321.
(11) (1884) 27 Ch. D. 394.
(12) [1897] 2 Ch. 12.
(13) [1900] 1 Ch. 237.
(14) (1869) L. R. 4 H. L. 82.
(15) [1897] 1 Ch. 289.

JOYCE J. 1902 HETLEY, *In re.* HETLEY *v.* HETLEY.

ascertain the class evidence is not admissible. If there is no trust or power in the nature of a trust, evidence is not admissible, and there is a resulting trust for the heir-at-law and next of kin: Lewin on Trusts, 10th ed. p. 65.

It is a strong thing to admit parol evidence where there is a gift for life, leaving the rest to go to the heir-at-law and next of kin, and there is a mere reference on the face of the will to a power which is not a general power.

If there were here such a power as that you could infer a trust by implication in default of appointment, then *In re Fleetwood* (1) would apply. But where the power is such that there is no indication of the persons to take in default of appointment, *In re Fleetwood* (1) does not apply. That case should not be extended.

Hughes, K.C., in reply. There is here a clear trust. It is much more than a power. This is not like *In re Weekes' Settlement.* (2) The testator desires and empowers his widow to carry out his wishes. That is a trust and not a power. The widow has no power either to select the objects or to apportion the interests.

Cur. adv. vult.

July 15. JOYCE J. In this case the testator, a gentleman of great wealth, having perfect confidence in his wife, and having probably arranged with her as to how his property should be disposed of, instead of giving, devising, and bequeathing everything to her absolutely with a request framed so as not to impose any obligation that she would dispose of the property as agreed between them, made a will, which, after appointing her sole executrix, proceeded in the following terms: "I give, devise, and bequeath to her all my real and personal estate whatsoever and wheresoever for her use, enjoyment, and benefit during her life. And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her," &c.

Now, according to the true construction of the will, in my

(1) 15 Ch. D. 594. (2) [1897] 1 Ch. 289.

opinion, all that is thereby expressly given to the widow is a beneficial life interest. As to everything else that she takes, by virtue of her appointment as executrix or otherwise, she is a trustee, after payment of debts, &c., for the testator's heir-at-law and next of kin respectively. That is, however, subject to the clause, whatever may be its force and effect, beginning "I desire and empower her," &c. This clause purports to create a special power of disposition in the testator's widow—not a general power enabling her to do whatever she pleased with the property. Neither the objects of the power nor the limitations under which it is to be exercised are expressed in the will; but in order to ascertain these we are referred, not to any existing document which could be identified, and possibly for the purpose of probate treated as incorporated with the will, but to the wishes verbally expressed by the testator to his wife, and it is only in accordance with these wishes that the power is to be exercised.

Now, it is not absolutely clear that the wishes referred to were or might not be wishes expressed between the date of the will and the testator's decease. Unless these subsequently expressed wishes be excluded by construction, the clause I am considering is manifestly invalid from the reasons appearing in *Johnson* v. *Ball* (1) and similar cases. Assuming, however, that the testator must be taken to have referred only to wishes expressed prior to the execution of his will, parol evidence is not, in my opinion, admissible to shew what those wishes were, any more than it would be to fill up a blank or to explain any patent ambiguity in the will. By the Wills Act, 1837, no will can be valid unless it be in writing executed by the testator, and attested as by the statute provided. To define or supplement by parol evidence that which on the face of the will is left undefined or unexpressed would be to make a material addition to the written will.

Counsel for the parties desiring to support the validity of the power cited and urged me to follow the decision in *In re Fleetwood* (2); and it appears that Farwell J. in the recent

(1) (1851) 5 De G. & Sm. 85.

(2) 15 Ch. D. 594.

JOYCE J. 1902 HETLEY, *In re.* HETLEY *v.* HETLEY.

case of *In re Huxtable* (1), which however is, I am told, under appeal (2), felt himself, somewhat reluctantly, bound to recognise the authority of that decision. But Mr. Parker pointed out and convinced me that the case of *In re Fleetwood* (3) materially differs from the present, and that I should be extending the principle of that decision if I held that by the mode here adopted the testator created or could create a valid power of disposition in his widow. This is a case of an attempt to create a power, not of a definite trust for particular individuals, attaching upon a gift of the subject-matter to a named legatee or devisee. If I held this power to be valid, I should be going beyond *In re Fleetwood* (3), and, in spite of the Wills Act, should be introducing what Kay J. calls a serious innovation upon the law relating to testamentary instruments.

Therefore I hold the parol evidence to be inadmissible, and the clause purporting to create the power of disposition in question to be void for uncertainty. The consequence is that, subject to the life interest in the testator's widow, the testator's real and personal estate is undisposed of and goes as on an intestacy.

Solicitors: *Finch & Turner; Burgess, Cosens & Co.; J. E. Hetley.*

(1) [1902] 1 Ch. 214. (2) Since reversed. Now reported, ante, p. 793.
(3) 15 Ch. D. 594.

G. A. S.

TORBOCK *v.* LORD WESTBURY.

SWINFEN EADY J.

1902

July 29.

[1902 T. 405.]

Company—Meetings—Notice—Special Resolution—Amendment—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

A special resolution need not follow the exact terms of the notice given under s. 51 of the Companies Act, 1862, but may be amended at the first meeting, e.g., by reducing the remuneration proposed for the directors.

WITNESS ACTION.

This was an action by a shareholder to restrain the Northern Nigeria Exploration Syndicate, Limited, and its directors from giving effect to a special resolution as to the directors' remuneration passed and confirmed at general meetings held on March 4 and March 20, 1902, on the ground (inter alia) that, owing to an amendment at the first meeting, the resolution actually passed differed from the resolution of which formal notice had been given under s. 51 of the Companies Act, 1862.

The company's articles originally provided (art. 79) that the directors should be paid out of the funds of the company by way of annual remuneration such a sum as should be fixed by the five subscribers thereto in the memorandum which they should sign appointing the first directors.

In pursuance of this article the remuneration was fixed at 20 per cent. of the net profits of each year remaining after payment of a 20 per cent. dividend to the shareholders, any remaining profits to be divided as to one-half by way of further dividend to the shareholders, and as to the other half by way of additional remuneration to the directors. The directors' remuneration was to be divided amongst them in such proportions as they might determine.

On February 24, 1902, the board gave notice that an extraordinary general meeting would be held on March 4, 1902, for

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the purpose of considering and, if thought fit, passing (inter alia) the following resolution:—

"That the articles of association be altered by substituting the following article for art. 79—

"*Remuneration of Directors.*

"After the shareholders shall have received dividends amounting in the aggregate to 100 per cent., there shall be paid to the directors, as remuneration for their services, a sum equal to 40 per cent. of all further profits of the syndicate, whether such profits arise from the sale of the properties and assets of the syndicate or otherwise, and such 40 per cent. of the profits shall be divided amongst the directors in the proportion of 20 per cent. thereof to George Macdonald, as managing director, and the balance thereof between the remaining directors in such proportion as they may decide."

The meeting was duly held on March 4, 1902, and at the suggestion of a shareholder the resolution was amended by altering the "40 per cent." and "20 per cent." to "30 per cent." and "15 per cent." respectively. The resolution so amended was passed at this meeting, and confirmed at the meeting of March 20, 1902, of which due notice was given.

The plaintiff voted against the resolution at the first meeting, but did not attend the second meeting, having issued his writ on March 17, 1902.

Martelli, for the plaintiff. An amendment of a special resolution necessitates a fresh notice, as s. 51 requires "notice of the intention to propose *such* resolution" to be given: Buckley on Companies, 8th ed. p. 223; *In re Trench Tubeless Tyre Co.* (1), where the decision of Kekewich J. was reversed on the ground that the special resolution was not amended, but abandoned, and an ordinary resolution, not requiring special notice, substituted. The object of the notice is to inform the shareholder of the exact resolution to be proposed, so that he can determine whether or not he need attend the meeting and

(1) [1900] 1 Ch. 408.

support or oppose the resolution before him, or whether he can rely on the statutory majority being obtained, or not being obtained, for that particular resolution. The absent shareholder, who relies on the accuracy of the notice, must be protected: *Tiessen* v. *Henderson* (1); *Kaye* v. *Croydon Tramways Co.* (2) This object is clearly defeated, if amendments are allowed.

Eve, K.C., and *Ward Coldridge*, for the defendants. In *Tiessen* v. *Henderson* (1) and *Kaye* v. *Croydon Tramways Co.* (2) there was suppressio veri, so that the notice was misleading. That is not so here. The resolution is merely amended. There is no doubt that an entirely new resolution cannot be proposed under the guise of an amendment, but though the point must often have arisen in similar cases, it has never been contended that an amendment in pari materiâ with the resolution specified in the notice contravenes the statute and thereby necessitates a fresh notice. (3)

SWINFEN EADY J. In my opinion the original notice was sufficient under the Act. The case differs wholly from *Kaye* v. *Croydon Tramways Co.* (1), where there were in reality two proposals, one for the sale of the undertaking, and the other for payment of a substantial sum to the directors as compensation for loss of office, and the latter was undisclosed. In the present case full notice was given of what was intended to be done.

It is contended, however, that owing to the amendment no notice has been given of the resolution actually passed, and that it is therefore invalid as a special resolution.

This contention is not well founded. The resolution confirmed at the second meeting must no doubt be in the same form as that passed at the first meeting. In other words, the second meeting can only say Aye or No to the resolution

(1) [1899] 1 Ch. 861.
(2) [1898] 1 Ch. 358.
(3) See, for instance, *Wright's Case*, (1868) L. R. 12 Eq. 335, n., 341, n., 345, n.; *Young* v. *South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268, 277; *In re Teede & Bishop, Limited*, W. N. (1901) 52.

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passed at the first meeting. (1) But it is not necessary that the resolution passed at the first meeting should be in the identical terms of the resolution specified in the notice. Sect. 51 requires a special resolution to be passed "at any general meeting of which notice specifying the intention to propose such resolution has been duly given." If, therefore, proper and sufficient notice of the intention to propose the resolution is given, nothing more is required, and the resolution is not invalidated if, owing to an amendment at the first meeting, the resolution passed is not identical with that of the notice.

In the present case full notice was given of the intention to fix the directors' remuneration, and the only difference between the proposed resolution, as set forth in the notice of the first meeting, and the resolution actually passed was the reduction of the proposed remuneration from 40 to 30 per cent., the proportion allocated to the general manager being unaltered. I hold that this alteration did not invalidate the resolution; and I therefore dismiss the action with costs.

Solicitors: *H. H. Sherriff; Allen & Tennant.*

(1) Vide *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469, 484.

G. R. A.

JOYCE J.
1902
May 29;
July 24.

In re MAUNDER.
MAUNDER *v.* MAUNDER.

[1902 M. 44.]

Will—Construction—Gift in Remainder—Substitutionary Gift—Death "before becoming entitled"—Entitled in "Possession" or "Interest."

The testatrix gave all her property to trustees upon trust for her son R. for life, and on his decease she specifically devised certain freeholds to her several grandchildren, the children of R.; she then directed her trustees to pay the income of her residue to her son's widow for life, and after the death of the widow to divide the residue amongst all the children of her said son; and in the event of either of her grandchildren "dying before becoming entitled to any share of my estate hereinbefore in any way disposed of," she directed that the child or children of such deceased grandchild should take the parent's share, or, if there should be no such child or children, then that such share should vest equally in all her surviving grandchildren. The testatrix died leaving her son R. and eight grandchildren, his sons and daughters, surviving:—

Held, that the word "entitled" meant "entitled in possession," that the substitutionary clause was operative and might take effect at any time during the subsistence of the preceding life estate, and that the devises to the grandchildren were not indefeasibly vested, but were subject to be defeated or destroyed so long as the prior tenancy for life existed.

Commissioners of Charitable Donations and Bequests v. *Cotter*, (1841) 1 D. & War. 498; 58 R. R. 298, not followed.

THE testatrix by her will dated July 5, 1889, devised all her real and bequeathed all her personal estate to trustees in trust for her son Robert for his life, and on his decease she specifically devised various freehold properties to her respective grandchildren, the children of Robert, and then she continued as follows: "If there shall be any residue of my trust estate not disposed of, I direct my said trustees to pay the income thereof to my said son's wife for her life, and after her death to realize such residue and divide the net proceeds amongst all the children of my said son. And in the event of either of my grandchildren dying before becoming entitled to any share of my estate hereinbefore in any way disposed of, I direct that the child or children of such deceased grandchild shall take the parent's share, or, if there shall be no such child or children,

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then that such share or devise or bequest hereinbefore contained shall vest equally in all my surviving grandchildren."

The testatrix died in 1891, leaving her son Robert and eight grandchildren, his sons and daughters, surviving.

This summons was taken out by Robert, who was also sole acting executor, for the determination of the question whether the gift over in the event of either of the grandchildren "dying before becoming entitled" referred to a death before becoming entitled in possession or before becoming entitled in interest (that is to say, before the death of the testatrix), and whether the grandchildren were, subject to any prior life interest, absolutely entitled to the devises made to them respectively.

Gatey, for the plaintiff.

W. H. Cozens-Hardy, for one of the grandchildren. In this will death means death in the lifetime of the testatrix. "Entitled" means "entitled in interest": *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1); *Henderson* v. *Kennicot* (2); *In re Crosland.* (3)

G. Cave, for other parties in the same interest, referred to Theobald on Wills, 5th ed. p. 606, and supported the same contention.

P. Wheeler, for an infant great-grandchild of the testatrix. "Entitled" means "entitled in possession": *Turner* v. *Gosset* (4); *In re Noyce.* (5) The cases are summarized in 2 Jarman on Wills, 5th ed. p. 1625. *Doe* v. *Prigg* (6), upon which the decision in *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1) was founded, is no longer law: see *In re Gregson's Trust Estate.* (7) It is said that the words refer to death in the lifetime of the testatrix. The only object of that would be to provide for the issue of children dying before the testatrix leaving issue. But that is rendered unnecessary by s. 33 of the Wills Act. That is sufficient to distinguish

(1) 1 D. & War. 498; 58 R. R. 298.
(2) (1848) 2 De G. & Sm. 492.
(3) (1886) 54 L. T. 238.
(4) (1865) 34 Beav. 593.
(5) (1885) 31 Ch. D. 75.
(6) (1828) 8 B. & C. 231.
(7) (1864) 2 D. J. & S. 428.

this case from those relied upon against my contention. Both *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1) and *Henderson* v. *Kennicot* (2) were decided upon wills executed before the Wills Act. In *In re Crosland* (3) the gift was not to children of the testator; so that s. 33 of the Wills Act did not apply. Moreover, the gift in that case was immediate. Here there is no gift to the grandchildren until after the death of the son: see also 2 Jarman on Wills, 5th ed. pp. 1547–8.

Manby, for the trustees.

Cozens-Hardy, in reply. The word "entitled" refers primâ facie to "right" rather than to "possession." There is no context here to indicate that the word is intended to have other than its primary meaning. If the opposite contention be adopted, it is possible that in a certain event an intestacy might result. In *In re Noyce* (4) there was no immediate gift at all; it was a gift in futuro. So also in *Turner* v. *Gosset*. (5)

Cur. adv. vult.

July 24. JOYCE J. (after referring to the will). At the date of this will the testatrix was more than seventy-nine years of age. She had only one child, her son Robert, who was aged fifty-two, and he had several children ranging from the age of seventeen years to about four months.

As to the form of the gift, I observe that on the words of the will there is no gift to the grandchildren until after the death of the son. The testatrix does not say "subject to the life estate of my son I give the property to my grandchildren"; but she says "on the death of my son I then devise," &c.; and then follow the various specific devises to the grandchildren. The question is, What is the effect and meaning of the term "entitled" in the clause beginning "in the event of either of my grandchildren dying before becoming entitled"? It is sought, on the one hand, to limit the effect of that clause to the lifetime of the testatrix; and, on the other hand, to make it operate at any time during the preceding life estate of

(1) 1 D. & War. 498; 58 R. R. 298.
(2) 2 De G. & Sm. 492.
(3) 54 L. T. 238.
(4) 31 Ch. D. 75.
(5) 34 Beav. 593.

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the son Robert. Well, looking at the words of the will alone, no ordinary person would have said that the grandchildren were entitled to any share until the death of the son; it would rather be said that they would become entitled on the death of the son. If the testatrix had meant that this clause should only operate during her own lifetime, nothing would have been easier or simpler than to have said "in the event of my grandchildren dying in my lifetime," then such and such things shall happen. More than this, I think the words she has used point the other way. She says: "I direct that the child or children of such deceased grandchild shall take the parent's share, and, if there shall be no such child or children, then that such share . . . . shall vest equally in all my surviving grandchildren." To my mind, these words are much more appropriate to a substitution in the lifetime of the tenant for life than to substitution in the lifetime of the testatrix.

Now, the word "entitled" has no defined legal meaning—that is, as between the sense of being entitled in possession and entitled in interest; and, as Lord Cranworth says in *Jopp* v. *Wood* (1), "The whole case depends on our putting a proper interpretation on the word 'entitled.' That word may, without any violence to language, mean entitled in interest, or entitled in possession"; and in that particular case the Lord Chancellor held that it meant entitled in possession. I agree that that was a different case: the words were different, and it related to the construction of a settlement.

On the construction of this will I am of opinion that the word "entitled" means "entitled in possession," and that the clause in question may take effect at any time during the lifetime of the preceding tenant for life. In coming to this conclusion, I think that I am deciding in accordance with Lord Romilly's decision in the case of *Turner* v. *Gosset* (2), where *Commissioners of Charitable Donations and Bequests* v. *Cotter* (3) was cited, and my decision is also in accordance with that of Bacon V.-C. in *In re Noyce* (4), where the Vice-Chancellor made some observations upon the case of *Commissioners of*

(1) (1865) 2 D. J. & S. 323, 329.
(2) 34 Beav. 593, 594.
(3) 1 D. & War. 498; 58 R. R. 298.
(4) 31 Ch. D. 75.

Charitable Donations and Bequests v. *Cotter*. (1) Further than that, it is in accordance with what Knight Bruce V.-C. would have decided in *Henderson* v. *Kennicot* (2) had he not been embarrassed by the decision in *Commissioners of Charitable Donations and Bequests* v. *Cotter*. (1) This last was an Irish case. The decisions in Ireland are to be treated with respect here; still they are not binding, though the decisions of Lord Redesdale and Lord St. Leonards have been treated with especial respect and as of almost equal authority to the English decisions. But Lord Chancellor Sugden's decision in *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1) is founded upon the case of *Doe* v. *Prigg* (3), which, in my opinion, is no longer law. Malins V.-C. in *Marriott* v. *Abell* (4) said that *Doe* v. *Prigg* (3) was overruled by the case of *In re Gregson's Trust Estate*. (5) [His Lordship, after referring to the judgments of the Lords Justices in that case, proceeded as follows:—] Upon that I am of opinion that the reason upon which the decision in *Commissioners of Charitable Donations and Bequests* v. *Cotter* (1) was founded no longer exists, and I shall follow the cases in England which are contrary to it. There is also a case of *In re Crosland* (6), before Kay J., which was very different to the present, being a case of an immediate gift of a legacy of which the payment was postponed, but without there being any preceding life estate.

I hold, therefore, that the substitutionary clause in this will may operate at any time during the subsistence of the preceding life estate, and that the devises to the grandchildren are not indefeasibly vested, but are subject to be defeated or destroyed so long as the prior tenancy for life exists.

Solicitors: *Young & Sons; Leslie Antill & Arnold; Marshall & Co.; Oldfield, Bartram & Oldfield.*

(1) 1 D. & War. 498; 58 R. R. 298.
(2) 2 De G. & Sm. 492.
(3) 8 B. & C. 231.
(4) (1869) L. R. 7 Eq. 478.
(5) 2 D. J. & S. 428, 436, 440.
(6) 54 L. T. 238.

G. A. S.

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ADMINISTRATION—*Marshalling Assets—Direction for Payment of Debts—Insufficiency of Personal Estate—Pecuniary Legatees and specific Devisees.*

Where a will contains a general direction for payment of debts, and the personal estate is insufficient, pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate.

In re Bate, (1890) 43 Ch. D. 600, must on this point be treated as overruled.

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2. —— *Order of Administration of Assets—Insufficient Personal Estate—Residuary Bequest—Trust dehors the Will of specified Part of Residue.*

A testatrix devised her real estate and bequeathed the residue of her personal estate to A., who was one of the executors of the will, and by a subsequent written memorandum (not attested as a will) the testatrix expressed her wish that a specified part of the residue should go to third persons whom she named. The memorandum was communicated by the testatrix to A., and was assented to by her, and she admitted that it created a trust binding upon her. The residuary personal estate (other than that comprised in the memorandum) was insufficient for the payment of the debts of the testatrix:—

Held, that the memorandum must be treated as if its contents had been contained in the will or a codicil, so that for the purpose of administration the trust of the specified part of the residue stood in the same position as a specific bequest of that part:

Held, consequently, that the debts of the testatrix must be paid first out of that part of the residue which was not affected by the trust, and

ADMINISTRATION—*continued.*

that then the deficiency must be borne rateably by the specified part of the residue and the real estate.

Decision of Kekewich J., [1901] 2 Ch. 372, reversed. *In re* MADDOCK. LLEWELYN *v.* WASHINGTON - - - - - **C. A. 220**

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An order for attachment made under s. 4 of the Debtors Act, 1869—which preserves imprisonment for debt in the six cases of default there specified—is not in the nature of a remedy for the recovery of a debt, but is in the nature of a punishment—that is, punishment for an offence; and a second punishment cannot be awarded for the same offence.

Therefore where a debtor has been imprisoned under an order made for his attachment for default in payment of a sum of money which he had been ordered to pay (sub-s. 3), but was by mistake released before the expiration of the one year limited for imprisonment by the section:—

Held, by the Court of Appeal, reversing the order of Swinfen Eady J., that there was no jurisdiction to make a second order for attachment for the same default; though, *semble*, an order for rearrest might have been made under the original order for attachment.

Per Mathew L.J.: In case of an order for rearrest, the period of imprisonment must end with the twelve months from the date of the original imprisonment, inclusive of the time the debtor had been at liberty. CHURCH'S TRUSTEE *v.* HIBBARD - - - - C. A. 784

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E. McMurdo died in 1889 insolvent, and an order was made for the administration of his estate. A creditor for 47,000*l.* held as security (inter alia) shares and debentures of the Delagoa Bay Railway. The railway was seized by the Portuguese Government, and an arbitration tribunal was appointed in 1891. The creditor declined to prove for his debt, and stated that he preferred to rely on his securities. In 1893 the chief clerk filed his certificate, in which the creditor's claim was entered as disallowed. In 1900 the award was made, and resulted in the creditor only receiving 1448*l.* in respect of his shares and debentures. In January, 1902, he took out a summons to vary the certificate by allowing his claim, and for liberty to prove for his debt:—

Held, by Swinfen Eady J., that the Chancery practice still applied to the administration of insolvent estates, although by s. 10 of the Judicature Act, 1875, the Bankruptcy Rules were also in force; therefore the creditor could not come in and prove after certificate, unless he shewed special circumstances in his favour; and that he had not done so:

Held, by the Court of Appeal, that under s. 10 of the Judicature Act, 1875, the Bankruptcy Rules applied to the case, and that under them the creditor could come in and prove at any time if there were assets undistributed, and if no injustice would be caused; that he could do the same thing in an administration in the Chancery Division; that, inasmuch as his debt had not been adjudicated upon, the disallowance of it in the certificate was not a fatal objection; that if it was necessary to shew special circumstances he had done so; that the certificate need not be varied; and that the creditor must be allowed upon terms to come in and prove.

Semble, a mortgagee of shares is not bound to watch the market so as to sell them at the highest price; and he does not by failing to sell at the most favourable opportunity lose his right to prove against the estate of the mortgagor.

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CHARITY—*Bequest "for the Charitable Purposes agreed upon between" the Testatrix and the Legatee — Evidence — Admissibility — Will—Construction—Charitable Legacy—Limited Charitable Purpose.*

A testatrix bequeathed 4000*l.* to C. "for the charitable purposes agreed upon between us":—

Held, that this was a gift for limited charitable purposes, and that evidence was admissible to shew what the purposes agreed upon were.

Decision of Farwell J., [1902] 1 Ch. 214, on this point, affirmed.

But *held*, that, the gift on the face of the will being of the capital of 4000*l.*, evidence was not admissible to contradict the will by shewing that the agreement between the testatrix and the legatee was that only the income of the 4000*l.* during his life should be devoted to the charitable purposes.

Decision of Farwell J. on this point reversed.

The Court directed that a scheme should be settled. *In re* HUXTABLE. HUXTABLE *v.* CRAWFURD - - - - - **C. A. 793**

2. —— *Mortmain—Real Estate—Devise of Land on Trust for Sale—Bequest of Proceeds to Charity—Extension of Time for Sale—Right of Trustees to retain Land Unsold—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 3, 5.

A devise of real estate to trustees upon trust to sell the same and hand over the proceeds to a charity is a gift of "personal estate arising from the land" within the exception of s. 3 of the Mortmain and Charitable Uses Act, 1891, and is not affected by ss. 5, 6, and 8 of that Act. The trustees are not obliged to sell the land within a year from the testator's death, but may retain it without obtaining the leave of the Court. They are not, however, at liberty to postpone the sale indefinitely. *In re* SIDEBOTTOM. BEELEY *v.* WATERHOUSE - - - - - **C. A. 389**

3. —— *Officers of Voluntary Associations—Charitable Uses — Will — Impure Personalty — Gift to named Persons "or their Successors"—Charitable Uses Act*, 1735 (9 *Geo.* 2, *c.* 36), *s.* 3.

A testator, who died in 1886, gave the rents of his freehold and leasehold estates to his wife for life, and after her death he directed his trustees to sell the property and to divide the proceeds in (amongst others) the following legacies: "To M. O., H. M., A. C., Nazareth House, Hammersmith, or their successors, 400*l.* To E. M. and M. L., of the Convent of the Assumption, Bromley-by-Bow, or their successors, 300*l.*"

At the date of the will and of the death of the testator M. O., H. M., and A. C. were members and officials of a religious community known as the Poor Sisters of Nazareth; and E. M. and M. L. were members and officials of a religious community known as the Little Sisters of the Assumption. Both of these communities were societies of Roman Catholic ladies living together in a state of celibacy for the purpose of sanctifying their souls by prayer and pious contemplation: and also as to the Poor Sisters of Nazareth, with the object of affording permanent homes for aged and infirm persons of both sexes; and as to the Little Sisters of the Assumption, with the object of gratuitously nursing the sick of the poorest classes in their own homes:—

Held, that the bequests were not gifts to the named individuals for their own personal benefit, but to them as holders of offices and for the benefit of the associations in which they respectively held office; and that, as the objects of the

CHARITY—*continued.*
associations were charitable, the gifts were void under the Mortmain Act, 1736.
Cocks v. *Manners*, (1871) L. R. 12 Eq. 574, followed. *In re* DELANY. CONOLEY *v.* QUICK
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COMPANY—*Debentures—Registration—Creation of Charge—Resolution to issue Series of Debentures—Sealing—Issue—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

In August, 1900, a company resolved at a meeting of its directors to issue at par twenty debentures of 100*l.* each bearing interest at 6 per cent. and redeemable at twelve months from date of issue. On August 31, 1900, the twenty debentures were sealed with the company's seal. By the debentures the company charged with the payment of principal and interest thereon its undertaking and all its property by way of floating charge. Ten of these debentures were issued in September, 1900, but the remaining ten were retained in the possession of the company, and not issued until January 5, 1901, at which date the Companies Act, 1900, was in force. Sect. 14 of that Act provides for the registration of mortgages or charges "created" by a company after the commencement of the Act:—

Held, that the debentures issued on January 5, 1901, did not require registration under the Act. *In re* THE SPIRAL GLOBE, LIMITED (No. 2). WATSON *v.* THE SPIRAL GLOBE, LIMITED.
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2. —— *Debentures—Registration—Extension of Time—Protection of Creditors—Series of Debentures ranking pari passu—Preservation of Rights of Debenture-holders inter se—Practice—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 14, 15.

The directors of a company resolved in 1899 to raise 85,000*l.* on debentures. The debentures were secured on property included in a covering deed and by a charge on all the property of the company, including its uncalled capital, for the time being as a floating charge, and were stated to form one series all of which were to rank pari passu. Some of the series were issued before the Companies Act, 1900, came into operation, and, therefore, did not require registration. Three hundred and twenty-seven of the remaining debentures were issued after that date, but were not registered. The holders of these debentures and the company applied for an extension of time to enable them to carry out the registration.

Kekewich J. extended the time, but added to the order the qualification introduced by *In re Joplin Brewery Co.*, [1902] 1 Ch. 79, for the protection of creditors.

Held, by the Court of Appeal, that the order must be varied in such a way as to preserve the rights of equality of the debenture-holders inter se. *In re* I. C. JOHNSON & Co. C. A. 101

3. —— *Director—Articles of Association—Qualification Shares—Holding Shares "in his own Right"—Bankrupt Director—Charging Order—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 14.

Where articles of association of a company require a director to be qualified by holding shares "in his own right," it is not necessary that he should hold the shares as beneficial owner, but to comply with the articles he must hold them in such a way that the company may safely deal with him in respect of the shares, whatever his interest in them may be. And although holding them as a trustee without beneficial ownership is a compliance with the articles, it is not a compliance if he holds them in a representative character.

Plaintiff was adjudicated a bankrupt in 1888 and never obtained his discharge. In April, 1902, he was a director of and held 1000 shares in a company the articles of association of which required that the qualification of a director should be the holding "in his own right" of 100 shares, and that his office should be vacated if he ceased to hold the qualifying number of shares. In the same month the plaintiff's trustee in bankruptcy wrote to the company claiming these shares as his, but postponing his decision whether he would be registered himself or have some nominee registered as transferee. Thereupon the other directors excluded the plaintiff from the board on the ground that he had become disqualified. Subsequently a transfer of 100 other shares in the plaintiff's favour was executed and lodged with the company for registration. Although the trustee had not raised any objection to registration, the directors refused to register the transfer:—

Held, (1) that the plaintiff had ceased to hold the 1000 shares "in his own right," and was not entitled to an injunction to restrain his exclusion from the board; (2) that he was entitled to have the register of members rectified by the insertion of his name therein as holder of the second 100 shares.

The words "in his own right" for the purpose of qualification, and the same words for the purpose of a charging order under 1 & 2 Vict. c. 110, s. 14, have different meanings. SUTTON *v.* ENGLISH AND COLONIAL PRODUCE COMPANY
Buckley J. 502

4. —— *Directors—Fiduciary Position—Purchase of Shares—Negotiations for Sale of Undertaking—Obligation to Disclose.*

The directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company's undertaking. PERCIVAL *v.* WRIGHT - Swinfen Eady J. 421

5. —— *Meetings—Notice—Special Resolution—Amendment—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

A special resolution need not follow the

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exact terms of the notice given under s. 51 of the Companies Act, 1862, but may be amended at the first meeting, e.g., by reducing the remuneration proposed for the directors. TORBOCK *v.* LORD WESTBURY - - - **Swinfen Eady J. 871**

6. —— *Memorandum of Association—Reconstruction under Power in—Memorandum—Sale of Assets for Shares in New Company—Resolutions contemporaneously passed for approval of Sale Agreement and for Voluntary Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

The memorandum of association of a company contained powers to sell its undertaking for shares in another company, and to distribute amongst its members in specie any of its property. Its articles of association empowered the liquidators in its winding-up, with the sanction of an extraordinary resolution, to distribute in specie amongst the contributories any part of its assets. The company while a going concern agreed to sell its undertaking and all its property to another company, the consideration being—(*a*) that the purchaser company should pay the vendor company's debts and perform its obligations, and keep the vendor company and its liquidators and contributories indemnified; (*b*) that the vendor company should retain a sum to pay the costs of and incidental to its winding-up; (*c*) the allotment to the vendor company or its nominees of fully paid shares in the purchaser company. The agreement was conditional on its being sanctioned by an extraordinary resolution of the vendor company before January 1, 1902.

On December 30, 1901, the vendor company passed by a three-fourths majority resolutions—(*a*) that the agreement should be adopted and carried into effect; (*b*) for voluntary winding-up and the appointment of a liquidator, who was authorized to distribute any of the assets amongst the members in specie. At a subsequent meeting resolution (*b*) was confirmed as a special resolution:—

Held, that the sale was properly made under the power of sale in the memorandum, and was not vitiated by the fact that it involved the company's immediately going into voluntary liquidation; and that it was not in disguise a sale by the liquidator upon terms not justified by s. 161 of the Companies Act, 1862.

Cotton v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, followed and explained.

Payne v. *Cork Co.*, [1900] 1 Ch. 308, distinguished. DOUGHTY *v.* LOMAGUNDA REEFS, LIMITED **Buckley J. 837**

7. —— *Name—Corporate Name—Trade Name—Separate User—Right to Protection—Limited Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 41, 42.

A limited company may acquire a right to protection of a trade name used separately from its corporate name, although such user is in contravention of ss. 41, 42 of the Companies Act, 1862.

Pearks, Gunston & Tee, Limited v. *Thompson, Talmey & Co.*, (1901) 18 Rep. Pat. Cas. 185, followed.

Wright v. *Horton*, (1887) 12 App. Cas. 371, applied. H. E. RANDALL, LIMITED *v.* BRITISH AND AMERICAN SHOE COMPANY **Swinfen Eady J. 354**

8. —— *Name—Registered Name—Proposed New Company—Similarity of Name—Injunction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.

On an application by a company registered under the Companies Act, 1862, to restrain the registration of a new company with a title alleged to be so similar to that of the old company as to be calculated to deceive, it is material to consider—(1) what business has been or is intended to be carried on by the old company, and what is intended to be carried on by the new company; and (2) what sort of name has been adopted by the old company.

A company cannot, merely by registering as its title, or part of its title, a single word, whatever its nature, remove that word from the English language so far as regards its use in the title of subsequent companies.

A company registered as "Aerators, Limited," sought to restrain the registration of a new company with the name "Automatic Aerators Patents, Limited," on the ground that it so nearly resembled the name of the plaintiff company as to be calculated to deceive. The principal object of both companies was the manufacture of apparatus for the instantaneous automatic aeration of liquids; but the patents and apparatus of the plaintiff company were quite different from those of the defendants:—

Held, that the plaintiff company had no monopoly of the word "Aerator," which was a word in common use in the English language; and the injunction was refused. AERATORS, LIMITED *v.* TOLLITT - - **Farwell J. 319**

9. —— *Promoter—Fiduciary Relation—Sale of Property to Company—Secret Profit—Fraudulent Prospectus — Non-disclosure of Promoter's Interest — Liability of Promoter — Measure of Damages—Profit on Sale.*

The promoters of a company purchased property for the purpose of selling it to the company when formed. The property was conveyed to a trustee for the promoters nominated by them, and was afterwards by the direction of the promoters conveyed by him to a trustee for the company, who was also nominated by the promoters, they receiving from the company an increased price on the sale. The promoters also nominated the first directors of the company and provided the qualification of some of them. The prospectus of the company, which was issued for the purpose of inducing the public to subscribe for its shares, was prepared with the knowledge and privity of the promoters, so that, as the Court held, they were responsible for it. It did not disclose the fact that the promoters were the real vendors of the property to the company, but, on the contrary, represented the promoters' trustee as the vendor. The company afterwards went into liquidation.

Upon a summons by the liquidator to compel the promoters to account for the profit which they had obtained on the resale of the property:—

Held, that the promoters as such stood in a

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fiduciary position towards the persons who were invited to take shares in the company, and that it was their duty to disclose to those persons the fact that they were the real vendors to the company:

Held, that the prospectus was a fraudulent one, and that for their breach of duty by this non-disclosure the promoters were liable in damages to the company, and that the true measure of the damages was the profit which the promoters had obtained upon the purchase and resale of the property.

Decision of Wright J. affirmed. *In re* LEEDS AND HANLEY THEATRES OF VARIETIES, LIMITED **C. A. 809**

10. —— *Prospectus — Omission of Material Contract—"Knowingly issue"—Waiver Clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

If a director leaves to others, without further inquiry, a statement in the prospectus that there are or may be other material contracts, without giving the particulars of the contracts, and wilfully—that is, with knowledge that he is doing so—abstains from inquiry, he cannot rely on his ignorance as a defence to an action under s. 38 of the Companies Act, 1867. A plea of ignorance on the part of a director can only be maintained where the facts enable him to establish a right to say that the prospectus is not a document for which he is responsible.

No protection is afforded to those responsible for the issue of a prospectus, under a waiver clause which they invite subscribers to submit themselves to, unless they fairly disclose what is the nature of the rights which they ask should be waived. WATTS *v.* BUCKNALL **Byrne J. 628**

11. —— *Prospectus — Omission of Material Contract—Waiver Clause—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A waiver clause in a prospectus as to the disclosure of contracts under s. 38 of the Companies Act, 1867, may be enforced against an intending shareholder, if it is honest and not misleading, but not if it fails to give sufficient notice as to the nature of what is to be waived.

The prospectus of a mining company disclosed (inter alia) an agreement as to the purchase of the produce of the mine, and stated that the directors had guaranteed the subscription of a part of the capital, and would receive a commission for so doing. It then stated that there might also be various trade contracts and business arrangements in addition to the before-mentioned agreement as to the purchase of the produce, and that as these contracts and business arrangements and the above-mentioned underwriting agreements might constitute contracts within s. 38 of the Companies Act, 1867, applicants for shares should be deemed to waive the insertion of the particulars of any such contracts, arrangements, or agreements. The prospectus did not disclose a contract between the promoters and K., the future chairman of the company, whereby a firm of which K. was a member was to receive 12,000 fully paid 1*l.* vendor's shares, as to 2000 for commission for underwriting, and as to 10,000 for the use of the names of K. and the

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firm on the prospectus, and for adopting the company:—

Held, by Farwell J. and by the Court of Appeal, (1) that this was a contract which ought under s. 38 to have been disclosed; (2) that it was not covered by the waiver clause.

Per Romer L.J.: Apart from s. 38, the contract ought in fairness to intending investors to have been disclosed in the prospectus. CACKETT *v.* KESWICK - - - - **C. A. 456**

12. —— *Reduction of "Capital"—Cancellation of Paid-up Shares where Capital not lost or unrepresented by available Assets or repaid—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

In speaking of reduction of capital the word "capital" means neither nominal capital to the exclusion of paid-up capital, nor the latter to the exclusion of the former.

A reduction of nominal capital which is paid up must be so made as not to affect the equilibrium of the company's balance-sheet to the prejudice of the company's creditors. This equilibrium is not disturbed where the reduction is effected (*a*) by cancelling capital lost or unrepresented by available assets, or (*b*) by paying off capital in excess of the company's wants (in each case under s. 3 of the Companies Act, 1877), because in either case the balance item on the debit or credit side of the balance-sheet (as the case may be) is unaffected; but the section impliedly forbids the writing off of paid-up capital which is not lost or unrepresented by available assets or returned—the result in that case being to disturb the equilibrium of the balance-sheet by striking out of the debit or liability side a sum representing paid-up capital, leaving the credit or asset side unaffected.

A company had a nominal capital of 700,300*l.* divided into 1*l.* shares, of which 350,000*l.* were preference, 350,000 ordinary, and 300 founders' shares. All the shares were fully paid up. The existence of founders' shares with special rights being found inconvenient, and it being estimated that each fully paid founders' share was worth 260 ordinary shares with a liability to pay 1*l.* per share thereon, the company agreed with persons purporting to contract on behalf of themselves and the other holders of founders' shares that the 300 founders' shares should be cancelled on the terms of each holder of those shares taking in lieu thereof 260 unpaid ordinary shares (in all 78,000), which were to be provided by increasing the capital of the company by at least 78,000*l.* The agreement was conditional—(1) on its being ratified by the founders' shareholders and (2) approved by the company in general meeting, and (3) on the capital being increased as above mentioned, (4) on a special resolution being passed for reduction of capital by cancelling the founders' shares, and (5) on the Court's sanction being obtained to the reduction.

Resolutions were then passed—(*a*) increasing the capital of the company to 1,000,300*l.* by creating 150,000 further ordinary shares and 150,000 further preference shares, (*b*) (special) for reducing the capital to 1,000,000*l.* by cancelling the founders' shares, and (*c*) approving the

agreement. All the holders of founders' shares ratified the agreement.

Before issuing any of the new 300,000 shares the company petitioned the Court for an order confirming the reduction of capital.

Buckley J. refused to confirm the reduction (as the debit in the balance-sheet in respect of paid-up capital would thereby be reduced by 300*l.*, whereas the amount was only to be recouped by something to be done after the confirmation), but pointed out that the object in view could be attained by other means, for the adoption of which he allowed the petition to stand over.

The holders of the founders' shares having been joined as co-petitioners, on its being alleged and proved that the 78,000 shares had been allotted to them, and that they had paid considerably more than 300*l.* to the company in respect of those shares, and that they claimed no beneficial right or interest in the founders' shares, but held them in trust for the company and desired to have them cancelled by the Court:—

Buckley J. confirmed the reduction.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, distinguished.

Form of minute approved by the Court. *In re* ANGLO-FRENCH EXPLORATION COMPANY

Buckley J. 845

13. —— *Reduction of Capital—Petition for Confirmation—Losses to be borne equally or rateably in Proportion to Capital paid up on Shares—Shares of the same Class with Different Amounts paid—Article providing for Division of Capital in Winding-up—Jurisdiction to sanction equitable Scheme—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11.

There is no rule that where the articles of association of a company provide that, in the case of a winding-up, losses are to be borne by the members in proportion to the capital paid up on their shares, the same principle must be applied in the case of any reduction of capital as between shares in the same class with different amounts paid up. The Court has jurisdiction, after providing for the protection of creditors, to sanction any scheme which is not unjust or inequitable.

Decision of Farwell J., [1902] 2 Ch. 178, reversed. *In re* CREDIT ASSURANCE AND GUARANTEE CORPORATION, LIMITED - - **C. A. 601**

14. —— *Shares, Surrender of—Invalidity—Release of Shareholder's Liability—Rectification of Register—Discretion of Court—Lapse of Time—Limited Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 26, 35; *Sched. I., Table A, clauses* 20, 21.

A surrender of shares in a limited company, the company releasing the shareholder from further liability in respect of the shares, is equivalent to a purchase of the shares by the company, and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409.

A surrender of shares which has the effect of reducing the company's capital can be supported only under circumstances which would have justified a forfeiture of the shares, the validity of forfeiture being recognised by s. 26 of the Companies Act, 1862, and by Table A to that Act, clauses 20, 21.

Per Stirling L.J.: *Teasdale's Case*, (1873) L. R. 9 Ch. 54, ought not to have been followed in *Eichbaum* v. *City of Chicago Grain Elevators*, [1891] 3 Ch. 459, inasmuch as the circumstances of the two cases differed in a material point.

Semble, that *Teasdale's Case* has been overruled by *Trevor* v. *Whitworth*.

Per Cozens-Hardy L.J.: A surrender of fully paid shares is unlawful, except under circumstances which would justify a forfeiture.

A surrender of shares which is illegal and null and void having been made, the Court will, in an action by the surrenderor against the company, order the plaintiff's name to be restored to the company's register in respect of the surrendered shares, even after the lapse of years, the shares not having been meanwhile reissued or otherwise dealt with by the company.

Decision of Kekewich J., [1901] 2 Ch. 265, on the former point affirmed, and on the latter point reversed. BELLERBY *v.* ROWLAND & MARWOOD'S STEAMSHIP COMPANY - - - **C. A. 14**

15. —— *Voluntary Winding-up—Compulsory Order—Contributory—Fully paid Shareholder, Petition by—Surplus Assets—Directors—Presents of Shares—Fraud—Breach of Trust—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 145.

A contributory of a company, even though he is the holder of fully paid shares, is not debarred from presenting a compulsory winding-up petition by the mere fact that there is a voluntary liquidation pending in which there is a surplus or probable surplus of assets for distribution. The jurisdiction to make a compulsory order is not limited to cases either where the voluntary liquidation is proved to be a sham or a fraud, or where the petition is supported by creditors, but may be exercised wherever the Court is satisfied that the voluntary liquidation is existing in circumstances which are likely to prejudice the shareholders, and that some benefit will result to the shareholders by the exercise of the jurisdiction.

During the pendency of the voluntary winding-up of a company having surplus assets, a petition for a compulsory winding-up order was presented by a fully paid shareholder:—

Held, that the case was not one in which the Court would exercise its jurisdiction to make a compulsory order, the evidence not being sufficient to shew that any benefit would thereby result to the shareholders. The petition was therefore dismissed, but, in the circumstances, without costs.

Decision of Wright J. affirmed.

In re Haycraft Gold Reduction and Mining Co., [1900] 2 Ch. 230, and *In re Gutta Percha Corporation*, [1900] 2 Ch. 665, approved.

In re Gold Co., (1879) 11 Ch. D. 701, considered. *In re* NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS - - - - **C. A. 34**

16. —— *Winding-up—Examination, Private—Attendance of Solicitor—Undertaking not to Disclose—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

The examination of witnesses in the winding-

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up of a company under s. 115 of the Companies Act, 1862, is a private proceeding; therefore, where a witness directed to be examined under this section was attended by a solicitor who also represented a third party against whom an action by the company was pending:—

Held, that the registrar might exact from the solicitor, as the condition of his being allowed to be present at the examination, an undertaking not to disclose to any one without the leave of the Court any information he might acquire at the examination. *In re* London and Northern Bank, Limited. Haddock's Case. Hoyle's Case - - - - - - C. A. 73

17. —— *Winding-up—Resolution, Special—Declaration of Chairman—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The declaration of the chairman of a meeting called to pass a resolution under s. 51 of the Companies Act, 1862, is not conclusive where the declaration shews on the face of it that the statutory majority has not voted in favour of the resolution.

In re Hadleigh Castle Gold Mines, Limited, [1900] 2 Ch. 419, and *Arnot* v. *United African Lands, Limited*, [1901] 1 Ch. 518, distinguished. *In re* Caratal (New) Mines, Limited

Buckley J. 498

18. —— *Winding-up—"Surplus Assets"—Loss of Capital—Profits earned before Winding-up—Dividend not declared—Rights of Preference and Ordinary Shareholders inter se.*

The capital of a trading company consisted of 10*l.* shares, preference and ordinary, all paid up in full, the former being entitled to a cumulative preferential dividend. The articles of association empowered the directors to set aside out of the profits such sums as they thought proper as a reserve fund. For some years the preferential dividend was paid, and then for three years the business was carried on at a loss, the result being a loss of capital to the amount of 4346*l.* In the next year there was a profit of 1675*l.* on the year's trading, but the directors did not declare a dividend or make any appropriation of that sum. The company went into voluntary liquidation, the debts were all paid, and the capital, to the extent of 7*l.* per share, was returned to the shareholders. The sum of 1675*l.* remained in the hands of the liquidator:—

Held, upon the construction of the articles, that the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital rateably among all the shareholders.

Decision of Wright J., [1901] 2 Ch. 184, affirmed.

In re Bridgewater Navigation Co., [1891] 1 Ch. 155, and *Bishop* v. *Smyrna and Cassaba Ry. Co.*, [1895] 2 Ch. 265, considered and distinguished. *In re* Crichton's Oil Company - C. A. 86

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—— Winding-up—Costs—Taxation—Drawing bills of costs - - - 412
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COMPULSORY WINDING-UP—Company—Voluntary winding-up—Contributory—Jurisdiction - - - 34
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CONDITION—That devisee should take and use testator's name—Lunacy and death of devisee - - - - 193
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CONDITIONS OF SALE—Lease—Title—Waiver of objection—Objection as to root of title - - - - - 517
See Vendor and Purchaser. 6.

CONFLICT OF LAWS—Covenant to settle after-acquired property—Marriage with foreigner—Domicil—Law applicable
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CONTRACT—Prospectus—Omission of material Contract—Waiver clause - - 453
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—— Vendor and Purchaser.
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CONTRIBUTORY—Company—Voluntary winding-up—Compulsory order—Fraud—Breach of trust - - - 34
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CONVEYANCE—*Real Estate—Grant—Common Law Assurance—Statute of Uses* (27 *Hen.* 8, *c.* 10), *s.* 1—*Exception—Uncertainty—Election—Limitation of Estate of Freehold to commence in futuro—Validity.*

A freehold estate was conveyed by a vendor unto and to the use of the purchaser in fee simple, "except and reserving unto the vendor a piece of land not less than forty feet in width commencing at the point A marked on the plan" to the conveyance "and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from" other lands of the vendor. The exact position of the piece of land so excepted was not in any way defined either by boundaries or colour so as to distinguish it from the rest of the land described in the conveyance and plan. Subsequently the purchaser (who had bought the estate for building purposes) prepared a road plan shewing a strip of land forty feet in width as the site for a road extending from the point A on the plan to the conveyance to an intended road, also shewn on the road plan and afterwards completed, and which was the "nearest road" to the point A. This was said to operate as an election by the purchaser defining the "forty feet" piece and so making the uncertain exception certain:—

Held, that the "forty feet" piece so said to have been defined had not been effectually excepted from the conveyance, (1.) because the conveyance operated at common law and not under the Statute of Uses, so that the exception, being in the nature of a limitation of an estate of freehold to commence in futuro, was bad; and

CONVEYANCE—*continued.*

(2.) because, even if the conveyance could be held to operate under the Statute of Uses, the exception was bad as infringing the rule against perpetuities, since any election necessary to give effect to the exception might not be made, according to the terms of the conveyance, until after the "nearest road" had been made by the purchaser or his assignee, an event not necessarily occurring within the period prescribed by the rule.

Where there is a grant by deed with an exception out of it, the exception is to be taken as inserted for the benefit of the grantor and to be construed in favour of the grantee.

Whether an uncertainty in a grant or exception can be made good by election, *quære.*

Decision of Buckley J. affirmed. SAVILL BROTHERS, LIMITED *v.* BETHELL - C. A. 523

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—— Leasehold house—Title—Open contract—Breach of covenant to repair - 214
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CORPORATION—*Statutory Powers—Provisional Order — Electric Lighting — "Public Duty"—Negligence—Action—Acts done in Execution of Statute — Judgment — Costs — "Solicitor and Client"—Appeal—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

By the Public Authorities Protection Act, 1893, s. 1 (*b*), judgment for the defendant in an action brought in respect of acts, or alleged defaults, in execution of an Act of Parliament, "or of any public duty or authority," carries costs as between solicitor and client:—

Held, that the protection of the section extended to a municipal corporation acting under the powers conferred upon it by a provisional electric lighting order, duly confirmed by statute.

The enactment does not apply to appeals. JEREMIAH AMBLER & SONS, LIMITED *v.* BRADFORD CORPORATION - - - - C. A. 585

COSTS — "Disbursement" — Taxation — Estate duty, including in bill - - 242
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—— Disbursements — Deposit as security for costs of discovery - - - 596
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—— Leaseholds — "Deducing title" — Single document - - - - 551
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—— Lien for costs — Judgment creditor — Charging order—Priority - - 344
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See SETTLEMENT. 1.

DONATIO MORTIS CAUSÂ—*Subject-matter—Post Office Savings Bank—Deposit-book—Government Stock Investment Certificate.*

The delivery of a Post Office Savings Bank deposit-book may constitute a good donatio mortis causâ of the balance standing to the credit of the depositor; but where a deposit is invested by the Post Office Savings Bank for the depositor in Government stock under the regulations contained in the deposit-book by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit-book cannot constitute a good donatio mortis causâ of the Government stock. *In re* ANDREWS. ANDREWS *v.* ANDREWS - - - **Kekewich J. 394**

DRY-ROT—Rebuilding principal mansion-house—Salvage - - - - 274
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EASEMENT—"Accommodation works"—Level crossing - - - - 759
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—— Of necessity—Right of support - 557
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ECCLESIASTICAL LAW—*Offences by Clergymen—Deprivation—Separation Order by Court of Summary Jurisdiction—Persistent Cruelty—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 1, *sub-s.* 1 (*d*), (*e*)—*Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5, 12.

The Clergy Discipline Act, 1892, s. 1, sub-s. 1, directs that, if either (*d*) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (*e*) a separation order is made against a clergyman under the Matrimonial Causes Act, 1878, any preferment held by him shall be declared by the bishop to be vacant. By the Matrimonial Causes Act, 1878, a separation order could be obtained by a married woman against her husband upon the ground of his conviction for an aggravated assault upon her within the Offences against the Person Act, 1861. This provision was repealed by the Summary Jurisdiction (Married Women) Act, 1895; but s. 4 of that Act enabled a married woman whose husband had been convicted of an aggravated assault upon her under the Offences against the Person Act, 1861, or (among other things) had been guilty of persistent cruelty to her, to obtain from a Court of summary jurisdiction a separation order against him, and s. 5 provided that the separation order while in force should have the effect in all respects of a decree of judicial separation on the ground of cruelty. A separation order having been made against a vicar under this Act on the ground of his persistent cruelty, the bishop declared the vicarage vacant under the Clergy Discipline Act, 1892:—

Held, that the declaration could not be supported under clause (*e*), because the provision in the Act of 1895 enabling a married woman to obtain a separation order on the ground of persistent cruelty was not a re-enactment with modification within s. 38, sub-s. 1, of the Interpretation Act, 1889, of the repealed provision in the Act of 1878, so as to require the bishop to treat the separation order as a separation order under the Act of 1878; nor under clause (*d*), because a separation order under the Act of 1895 was not an order for judicial separation in a divorce or matrimonial cause. SWEET *v.* BISHOP OF ELY **Joyce J. 508**

EDUCATION.
See under SCHOOLS.

ELECTION — Real estate—Grant—Exception—Uncertainty - - - 523
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—— Trust for sale—Reconversion—Appropriation—Purchase by trustee for sale 296
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ELEMENTARY EDUCATION.
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EQUITY OF REDEMPTION—Barred by lapse of time—Realty or personalty - 859
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—— Clog on equity of redemption—Option to purchase mortgaged stock - 479
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ESTATE DUTY — Costs — Taxation—Including estate duty in bill - - - 242
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See MORTGAGE. 2.

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—— Admissibility—Parol evidence—Avoidance of gift for uncertainty - - 866
See WILL. 7.

—— Recital — Admissibility—Voluntary settlement—Trustee in bankruptcy - 360
See FRAUDULENT CONVEYANCE.

—— Tramway — Substantial commencement of "works" - - - - 714
See TRAMWAY.

EXAMINATION — Company—Winding-up—Attendance of solicitor—Undertaking not to disclose - - - - 73
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EXCEPTION—Real estate—Grant—Uncertainty—Election - - - - 523
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FAIR—Franchise—Tolls—Stallage - 145
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FRANCHISE—Fair—Tolls—Stallage - 145
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FRAUD — Co-partner, Liability for fraud of—Solicitors - - - - 404
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—— Equitable mortgage—Notice—Fraud of vendor's solicitor—Possession of title-deeds—Priority - - - - 399
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FRAUDS, STATUTE OF—Voluntary settlement—Trustee in bankruptcy, Title of 360
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FRAUDULENT CONVEYANCE — *Voluntary Settlement—Intention to defeat or delay Creditors—Inference of Intent—Protection of Creditors—Post-nuptial Settlement—Recital of Ante-nuptial Parol Agreement—"Memorandum or Note" in writing — Parties — Estoppel — Wife's Chose in Action—Husband's Interest determinable on Bankruptcy—Bankruptcy of Settlor—Trustee in Bankruptcy, Title of — Evidence — Admissibility of Recital — 13 Eliz. c. 5 — Statute of Frauds (29 Car. 2, c. 3), s. 4.*

By a post-nuptial settlement dated in 1873, to which the testamentary guardians of the wife, then an infant, were parties, after a recital that previously to the marriage the husband agreed to make such settlement of the wife's fortune as was thereinafter contained, it was witnessed that the husband, being entitled in right of his wife to a reversionary interest in personalty, subject to the contingency of his predeceasing her without reducing it into possession, covenanted that on the fund falling into possession he and his wife would assign it to the trustees on the usual trusts for the wife, husband, and issue of the marriage, the husband's life interest being determinable on bankruptcy. The husband was not indebted at the time, nor was he contemplating embarking in trade. In 1877 the wife died. In 1898 the husband was adjudicated bankrupt. In 1899 the fund fell into possession. There was issue of the marriage:—

Held, reversing the decision of Farwell J., [1901] 2 Ch. 145, that the settlement was good against the trustee in bankruptcy, on the grounds (1) that there was no evidence of its having been made with intent to defeat creditors so as to render it void under the statute 13 Eliz. c. 5, and no such intent ought, in the circumstances, to be inferred; and (2) that the deed was not voluntary but, taken as a whole, constituted such a note or memorandum of the recited parol antenuptial contract in consideration of marriage as satisfied the Statute of Frauds (29 Car. 2, c. 3), s. 4, and enabled the contract to be enforced both against the settlor who signed it and against his trustee in bankruptcy, the recital of the contract being admissible in evidence as against the trustee setting up the statute.

But whether the husband's life interest passed to the trustee in bankruptcy, *quære*.

In re Pearson, (1876) 3 Ch. D. 807, overruled. *Barkworth* v. *Young*, (1856) 4 Drew. 1, approved. *In re* HOLLAND. GREGG *v.* HOLLAND C. A. 360

FRAUDULENT PROSPECTUS — Non-disclosure of promoter's interest—Damages - 809
See COMPANY. 9.

GAVELKIND — *Descent — Partibility — Collaterals.*

The partibility of lands held in gavelkind among the heirs in equal shares extends to collaterals of every degree, and is not confined to brothers and their issue or nearer relations. The custom of gavelkind is the common law of the land in Kent, and its extension to collaterals is, therefore, a question for the judge, and need not be proved by usage, as in the case of a manorial custom which is in contravention of the common law. *In re* CHENOWETH. WARD *v.* DWELLEY - - - - Farwell J. 488

GRANT—"Executors, administrators, and assigns, undertenants and servants"—Licensees
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INFRINGEMENT—By-laws—Injunction—Special remedy - - - - 182
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—— Restrictive covenant — Trade — Lessee — Assigns - - - - 612
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—— Rate of interest—Breach of trust—Trust moneys employed in trade - 314
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INTERNATIONAL LAW — Covenant to settle after-acquired property—Marriage with foreigner—Domicil—Law applicable 333
See SETTLEMENT. 1.

INTESTACY—Hotchpot—Death of sole legatee and executrix - - - 605
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—— Mortgagee—Devolution of mortgaged land—Realty or personalty - - 859
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INVESTMENT—Capital moneys—Mortgage 575
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—— Capital moneys—Tenant for life—Trustees—Right to choose brokers - 350
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—— Shares—Exchange of shares in old company for shares in new company - 667
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JUDGMENT — Bankrupt director—Qualification shares — Holding shares "in his own right" - - - - - 502
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JUDGMENT CREDITOR — Solicitor — Lien for costs—Charging order—Priority - 344
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JUDICATURE ACT — Proof, Withdrawal of — Certificate—Application to restore proof 684
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JURISDICTION—Attachment, Second order for—Rearrest—Imprisonment - 784
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—— Capital moneys—Rebuilding mansion-house—Dry-rot—Salvage - - 274
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—— Offences by clergymen — Deprivation — Separation order by Court of summary jurisdiction - - - - 508
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—— Service out of the jurisdiction—Necessary or proper parties - - - 132
See PRACTICE. 2.

—— Voluntary winding-up — Compulsory order—Contributory - - - 34
See COMPANY. 15.

LANDLORD AND TENANT—*Lease—Quiet Enjoyment, Covenant for—Assignment of Reversion—Subsequent Purchase of adjoining Property by Assignee—Breach of Covenant—Personal Covenant—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 11.

In 1897 a lease for fourteen years of offices on the ground-floor of a house was granted to the plaintiff. The lease contained a covenant by the lessor for himself, his executors, administrators, and assigns, for the quiet enjoyment of the offices by the plaintiff without any disturbance by the lessor or any person lawfully or equitably claiming from or under him. In 1898 the defendant company bought the reversion in the house subject to the lease. In 1900 the company purchased from a stranger a house next door to that in which the plaintiff had his offices, pulled it down, and erected on the site of it buildings of such a height as to cause the plaintiff's chimney to smoke:—

Held, that the defendants had not broken the covenant inasmuch as the acts complained of had not been done by them, claiming the right to do such acts as authorized by or claiming under the lessor, but in exercise of their rights under an independent title acquired subsequently to the date of the covenant. The obligations of the lessor must be considered as at the date of the lease. DAVIES *v.* TOWN PROPERTIES INVESTMENT CORPORATION, LIMITED - **Byrne J.** 635

2. —— *Lease—Trade—Restrictive Covenant—Covenant by Lessor not to carry on or permit a particular Trade on adjoining Premises—Lessee—Assigns—Injunction.*

The lessee of a person bound by a restrictive covenant can be sued, whether "assigns" are mentioned in the covenant or not.

In a lease by H. to the plaintiff company, the lessor covenanted that he, his heirs, executors, administrators, and assigns, would not carry on, or permit to be carried on by others, in certain named shops the business of a tailor; H. subsequently demised one of the shops to B. for a tailoring business. In an action by the plaintiff company against H. and B. for an injunction to restrain H. from permitting, and B. from carrying on, this business:—

Held, on the construction of the covenant, that the mention of assigns, without mentioning

LANDLORD AND TENANT—*continued.*
lessees, afforded no ground, standing alone, for holding that the covenant was not binding upon B.; that though "lessees" were not mentioned eo nomine, the words of the covenant were sufficient to bind B. not to carry on the particular business referred to, and that an injunction ought to be granted.

Bryant v. *Hancock & Co.*, [1898] 1 Q. B. 716, distinguished.

The decision in *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974, is not inconsistent with that of *Fitz* v. *Iles*, [1893] 1 Ch. 77. HOLLOWAY BROTHERS, LIMITED *v.* HILL - - - **Byrne J. 612**

—— Lease—Mining—Tenant for life—Power of leasing—Varying minimum rent—Wayleave - - - - - **46**
See SETTLED LAND. 4.

—— Title—Waiver of objection—Objection as to root of title - - - - **517**
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LATENT DEFECT — Title — Misdescription — Underground culvert for water - **258**
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LEASE.
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LEASEHOLDS —Title — Open contract — Breach of covenant to repair - - **214**
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LEGACY.
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LEVEL CROSSING—"Accommodation works"—Grant of easement - - - **759**
See RAILWAY.

LICENSEES — Grant — "Executors, administrators, and assigns, undertenants and servants" - - - - **427**
See WAY, RIGHT OF.

LIEN — Costs — Solicitor — Charging order — Priority - - - - **344**
See SOLICITOR. 3.

—— General lien—Securities of customer **416**
See STOCKBROKER.

LIMITATIONS, STATUTE OF — *Mortgage — Acknowledgment — Payment of Interest "by the Person by whom the same shall be payable"—Person "bound to pay"—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The solicitor who acted for a mortgagor and after his death for his executors, and also for the mortgagees, paid the interest upon the mortgage debt to the mortgagees regularly up to a period within twelve years before the commencement of an action to enforce the mortgage:—

Held, that this was primâ facie a payment, within s. 8 of the Real Property Limitation Act, 1874, "by the person by whom the same shall be payable," so as to throw on the representatives of the mortgagor the onus of proving that the statute had run and the mortgage debt had not been kept alive:

Held, also, that the payment of interest by a person who, as between himself and the mortgagor, was bound to pay it, though he was under no contract with the mortgagee to do so, was a payment "by the person by whom the same shall be payable" within the meaning of s. 8, so as to prevent the statute from running.

Decision of Buckley J. affirmed.

Harlock v. *Ashberry*, (1882) 19 Ch. D. 539, considered and explained. BRADSHAW *v.* WIDDRINGTON - - - - **C. A. 430**

LOCAL GOVERNMENT—*Urban Authority—By-laws—Infringement—Erection of Houses abutting on Public Highway—Laying out New Street—Injunction—Special Remedy—Proceedings before Justices—Jurisdiction.*

The defendants were the owners of a triangular piece of land within the plaintiffs' borough. Two sides of the triangle abutted upon public highways within the borough. The defendants, in pursuance of a building scheme, erected houses on their land fronting the highways. The plaintiffs alleged that the defendants were laying out the highways as new streets which did not comply with the requirements of the borough by-laws as to width, and they claimed, first, an injunction, and, secondly, a declaration that the plaintiffs were entitled to remove or pull down any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might, subject to any statutory provision in that behalf, remove, alter, or pull down any work begun or done in contravention of the by-laws:—

Held, (1) that the defendants were not laying out or intending to lay out the highways as new streets within the meaning of the by-laws; (2) that the by-laws could not be enforced by action for an injunction, but only by the special remedies thereby provided, or by way of information by the Attorney-General; and (3) that no such declaration as asked for ought to be made. MAYOR OF DEVONPORT *v.* TOZER **Joyce J. 182**

LUNACY—*Insolvent Estate—Proof of Debt—Rate of Interest.*

The old rate of interest on debts has not been altered. Four per cent. is allowed on a judgment debt. *In re* HUNT. HARVEY'S CLAIM
Mathew L.J. 318, n.

MANSION-HOUSE —Rebuilding—Dry-rot—Salvage - - - - - **274**
See SETTLED LAND. 5.

—— Trust to keep up mansion-house and permit A. to reside - - - - **679**
See SETTLED LAND. 6.

MARKET—*Fair—Franchise—Fair and Market held on same Day—Merger—Change of Days for which Charter granted—Tolls—Stallage.*

The plaintiff, as lord of the manor of Worksop, was owner of a weekly provision and cattle market (held on Wednesdays) and two annual fairs granted by ancient charters with right of toll. The defendants were lessees of the markets under a lease granted in 1851 for ninety-nine years. This lease expressly excepted and reserved the fairs. In 1845 the then lord of the

MARKET—*continued.*
manor had, without licence from the Crown, changed the days of holding the fairs from March 21 and October 2 and 3, the days named in the charter, to the second Wednesdays in March and October. Until the date of the lease the markets and fairs were held in the streets. After that date the markets were held in buildings or on land provided by the defendants or their predecessors in title. On the two new fair days the fair was duly proclaimed by the crier of the lord, but nothing further was done by the lord. On these fair days the defendants charged an increased toll for stalls in the market to persons who only attended on fair days, but allowed regular attendants at the market to have stalls at the usual market rate. The defendants had also issued lists of tolls shewing an increased toll on fair days for "lots" of eggs, but this had not been collected. The plaintiff brought this action for an account of all tolls received by the defendants on fair days on the ground that they were fair tolls and not market tolls. It appeared that tolls were taken at the fair in the reign of Edward III., but there was no evidence of the payment of any fair tolls between that date and the date of the lease:—

Held, that there is no impossibility in holding a market and a fair in the same manor on the same day, and no presumption that the market is absorbed in the fair; that, though the change of days did not of itself forfeit the franchise of the fair, the lord could not legally recover tolls on days not named in the charter; that the increased tolls charged by the defendants on fair days were stallage payable to them as owners of the soil; that the owner of a fair or market, so long as he does not charge unreasonable tolls, is not bound to charge all persons alike, but may remit part of the toll to favoured persons; and that the parties had contracted for the lease upon the basis that no fair tolls were payable. DUKE OF NEWCASTLE *v.* WORKSOP URBAN DISTRICT COUNCIL Farwell J. 145

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARSHALLING—Assets—Pecuniary legatees and specific devisees - - 834
See ADMINISTRATION. 1.

MEETINGS—Notice—Special resolution—Amendment - - - 871
See COMPANY. 5.

MEMORANDUM OF ASSOCIATION—Company practice.
See under COMPANY.

MINE—Tenant for life—Power of leasing—Varying minimum rent—Way-leave 46
See SETTLED LAND. 4.

MISDESCRIPTION—Title, Failure to shew—Latent defect—Underground culvert for water - - - - 258
See VENDOR AND PURCHASER. 9.

MISREPRESENTATION—Name, Unauthorized use of—Holding out as partner—Injunction - - - - - 282
See NAME.

MISTAKE—Sale by auction—Purchase of wrong lot—Specific performance - - 266
See VENDOR AND PURCHASER. 4.

MONEY HAD AND RECEIVED—Voidable contract—Assignment of contract—Privity of contract - - - - 359
See VENDOR AND PURCHASER. 1.

MORTGAGE—*Freeholds—Mortgagee in Possession—Equity of Redemption barred by Lapse of Time—Intestacy of Mortgagee—Devolution of Mortgaged Land—Realty or Personalty.*

Where a mortgagee of freeholds enters into possession of the mortgaged land, and dies, leaving all his property to his widow for life but otherwise intestate, and the possession is continued by the widow, who is not solely entitled to the mortgage debt, until the equity of redemption is barred by the Real Property Limitation Act, 1874, the mortgaged land passes as personalty to his next of kin. *In re* LOVERIDGE. DRAYTON *v.* LOVERIDGE - - Buckley J. 859

2. —— *Priority — Equitable Mortgagee — Trustee and Cestui que Trust—Principal and Agent—Conflicting Equities — Priority — Negligence—Enabling Third Person to commit Fraud—Estoppel — Receipt Clause — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 55.

R. delivered to a stockbroker a mortgage bond for 2000*l.* with instructions to sell it. The bond was one of a series issued by the Tyne Improvement Commissioners under a private Act which incorporated the Commissioners Clauses Act, 1847. That Act requires that all transfers of mortgages should be registered. Induced by the false representations of the broker, R. executed two deeds of transfer, by which the mortgage bond was transferred to the broker in two portions of 1500*l.* and 500*l.* respectively. These transfers were in a form prescribed by the schedule to the Commissioners Clauses Act, and were expressed to be made in consideration of 1500*l.* and 500*l.* respectively paid by the broker to R. They were duly registered. The broker borrowed 1000*l.* from the defendant W. and executed a formal sub-mortgage of the bond to him, producing the transfers as proof of title. This mortgage was not registered. The broker had applied the money to his own use and absconded. This action was brought by R. for retransfer of the bond free from the mortgage to W.:—

Held, that where an owner of property gives all the indicia of title to another person with the intention that he should deal with the property, the principles of agency apply, and any limit which he has imposed on his agent's dealing cannot be enforced against an innocent purchaser or mortgagee from the agent, who has no notice of the limit.

If the owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property for value.

The statement, in a transfer of mortgage made in a form prescribed by statute, that the mortgage is transferred in consideration of *l.* paid

MORTGAGE—*continued.*

by A. to B., without any express receipt clause, is sufficient to create this estoppel.

On both these grounds the equitable title of R. was postponed to W.'s charge.

Perry Herrick v. *Attwood*, (1857) 2 De G. & J. 21, explained and followed.

Carritt v. *Real and Personal Advance Co.*, (1889) 42 Ch. D. 263, explained and distinguished.
RIMMER *v.* WEBSTER - - **Farwell J. 163**

3. —— *Priority—Portion—Mortgage pursuant to Order of Court to raise two out of three Portions charged on Real Estate.*

Under the will of a testator who died in 1851 three sums of 5000*l.* for children's portions were charged on his real estate. In 1880 two of the portions had become raisable, and in an action brought for the purpose of clearing the estate from charges an order was made in 1882 directing that the two portions should be raised by a mortgage of the estate to a person who was willing to lend the money, such mortgage to be settled by the judge. The mortgage as settled contained recitals of the title to the portions and of the proceedings in the action, and was expressed to be without prejudice to any charge which might be subsisting in the mortgaged hereditaments under the will. The money was paid by the mortgagee into court, and was afterwards distributed among the persons interested. In an action by the mortgagee claiming priority over the persons interested in the remaining portion:—

Held, that the Court, in fulfilling the testator's directions, which was its only duty, could not have intended to place two of the portions in a better position than the third, or to give the mortgagee a charge for the two in priority to the third, which was from the first equally entitled to a like charge under the will:

Held, therefore, that, notwithstanding that the third portion was at present only charged in equity by virtue of the will, whereas the plaintiff had a legal mortgage sanctioned by the Court, the plaintiff was only entitled to a charge on the estate for the two sums of 5000*l.* pari passu with the third sum of like amount. NIGHTINGALE *v.* REYNOLDS - - - **Kekewich J. 117**

4. —— *Redemption, Clog on Equity of—Stock—Option to Purchase Mortgaged Stock.*

A loan was made to a company on the terms of a letter whereby the borrowers agreed to secure the repayment of the loan with interest by the transfer of certain debenture stock, and it was stipulated that the lender should have the option of purchasing the whole or any part of the debenture stock at 40 per cent. at any time within twelve months, and that the advance should become due and payable with interest at thirty days' notice on either side:—

Held, applying *Noakes & Co.* v. *Rice*, [1902] A. C. 24, that the stipulation giving the option to purchase the mortgaged stock was a clog or fetter on the right of redemption, and accordingly void.
JARRAH TIMBER AND WOOD PAVING CORPORATION, LIMITED *v.* SAMUEL - - **Kekewich J. 479**

—— Investment on mortgage—Capital moneys
See SETTLED LAND. 1. **575**

MORTGAGE—*continued.*

—— Notice—Fraud of vendor's solicitor—Possession of title-deeds—Priority - **399**
See VENDOR AND PURCHASER. 1.

—— Person "bound to pay" - - **430**
See LIMITATIONS, STATUTE OF.

MORTMAIN—Sale, Extension of time for—Right of trustees to retain land unsold - **389**
See CHARITY. 2.

MUNICIPAL CORPORATION.
See under CORPORATION.

NAME—*Injunction—Unauthorized use of Name—Holding out as Partner—Misrepresentation—Reasonable Probability of Risk and Liability.*

A dealer in cycles having advertised his goods in a manner which satisfied the Court that he intended the public to believe that the proprietors of *The Times* newspaper were either the vendors, for whom he acted as manager, or partners or in some way responsibly connected with the sale of "Times" cycles:—

Held, on the authority of *Routh* v. *Webster*, (1847) 10 Beav. 561, that as the plaintiffs, the proprietors of *The Times*, were exposed to some risk and liability by the unauthorized use of the name of their newspaper by the defendant, and that as there was a reasonable probability of *The Times* being exposed to litigation, and possibly being made responsible, had the plaintiffs not taken steps to disconnect the name of their newspaper from the advertisement and circulars issued by the defendant, an interim injunction ought to be granted restraining the defendant from in any way representing that the cycles offered by him for sale were in fact offered for sale by the plaintiffs, or that he was carrying on business as a department of *The Times*, or in any way holding out *The Times* to be the owners of or connected with his business.

Principles on which injunctions are granted in cases of this nature discussed. WALTER *v.* ASHTON - - - - **Byrne J. 282**

—— Company—Registered name—Proposed new company—Similarity of name—Injunction - - - - - **319**
See COMPANY. 8.

—— Company—Trade name—Separate user—Right to protection - - **354**
See COMPANY. 7.

—— Condition that devisee should take and use testator's name—Lunacy and death of devisee - - - - **198**
See WILL. 3.

NEXT OF KIN—Ultimate trust for, of wife—"Die without having been married"
See SETTLEMENT. 2. **112**

NOMINATION—Partners, Consent or refusal by continuing—Rights of nominee - **735**
See PARTNERSHIP. 1.

NOTICE—Equitable mortgage—Fraud of vendor's solicitor — Possession of title-deeds — Priority - - - - **399**
See VENDOR AND PURCHASER. 3.

—— Meetings—Special resolution—Amendment
See COMPANY. 5. **871**

NOVATION—Co-partner, Liability for fraud of—Election—Solicitors - - 404
See PARTNERSHIP. 2.

OFFENCES—Clergyman—Deprivation—Separation order by Court of summary jurisdiction - - - - 508
See ECCLESIASTICAL LAW.

OPTION—Clog on equity of redemption—Option to purchase mortgaged stock - 479
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PAROL EVIDENCE—Admissibility—Avoidance of gift for uncertainty - - 866
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PARTIBILITY — Gavelkind — Descent — Collaterals - - - - 488
See GAVELKIND.

PARTNERSHIP—*Articles of Partnership—Power for any Partner to nominate Successor—Nomination—Acceptance by Nominee—Consent or Refusal by continuing Partners—Rights of Nominee—Specific Performance—Equitable Relief.*

Where, in partnership articles, it has been agreed between the partners that any one of them shall be at liberty to nominate and introduce any other person into the partnership, and a valid nomination is made by one partner accordingly, followed by acceptance of the nomination by the nominee, the other partners are bound to give effect to the nomination, and, in case of their refusal to admit the nominee as partner or to do and execute the acts and deeds necessary for conferring upon him the rights of a partner, he is entitled, as against them, to such relief as Courts of Equity are in the habit of granting to persons standing in the relation of partners, subject to his fulfilling, on his part, such conditions of his admission as may be contained in the articles, such as executing a proper deed, or otherwise.

Lovegrove v. *Nelson*, (1834) 3 My. & K. 1, 20; 41 R. R. 12, *Page* v. *Cox*, (1851) 10 Hare, 163, and Lindley on Partnership, 6th ed. p. 368, considered. BYRNE *v.* REID - - C. A. 735

2. —— *Liability for Fraud of Co-partner—Contract with Individual before Partnership—Novation—Election to abide by Contract with Individual—Solicitors.*

Where A. has a contract with B., and B. takes C. into partnership and gives A. notice, A. has an option whether he will abide by his contract with B. alone or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business.

The plaintiffs appointed B. their solicitor, and instructed him to act for them in a mortgage transaction. While the business was pending, B. took the defendant into partnership, and gave the plaintiffs notice in writing. The plaintiffs paid no attention to the notice, continued to correspond with B. in his own name, and finally sent him the money to advance on the mortgage by cheque made payable to his order, and accepted his receipt in his own name. B. paid the money into his own account and misappropriated it:—

Held, that the plaintiffs had elected to continue to employ B. alone, and the defendant was not liable for B.'s fraud. BRITISH HOMES ASSURANCE CORPORATION, LIMITED *v.* PATERSON
Farwell J. 404

PARTNERSHIP—*continued.*

—— Name, Unauthorized use of—Holding out as partner—Injunction - - 282
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—— Solicitor—Lien for costs—Judgment creditor—Charging order—Priority - 344
See SOLICITOR. 3.

PERPETUITY — *Appointment — Remoteness — "Possibility on a Possibility"—Gift to an unknown Person for Life, and after his Death to his Children—Personal Estate.*

The old rule against "a possibility on a possibility," namely, that although an estate may be limited to an unborn person for life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, has no application to personal estate.

By a marriage settlement personal estate was settled in trust, after life interests given to the husband and wife, for the children of the marriage, or any issue born in the lifetime of the survivor of the husband or wife, in such shares and manner as they should jointly appoint. They appointed in equal shares to the three children of the marriage for life, and after their respective deaths to such of their children born in the lifetime of the husband and wife as should attain twenty-one:—

Held, a good appointment, and not void for remoteness. *In re* BOWLES. AMEDROZ *v.* BOWLES
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PORTIONS—Mortgage—Priority - - 117
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"POSSIBILITY ON A POSSIBILITY"—Appointment—Remoteness - - 650
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POST OFFICE—Savings bank—Deposit-book
See DONATIO MORTIS CAUSÂ. 394

POWER OF APPOINTMENT—*General Testamentary Power—Exercise—Covenant to exercise Power by way of Security for Loan—Liability of Appointed Fund for Debts.*

The donee of a general testamentary power of appointment over a fund borrowed a sum of money and, as security for the loan, covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund, and that he would not revoke the will. He made a will accordingly, and died:—

Held, that the covenant was ineffectual to bind the fund, and that, notwithstanding that the will was made in pursuance of the covenant, the lender was a volunteer as against the testator's general creditors, and therefore took subject to the rule that the exercise by will of a general power of appointment makes the property which is the subject of the power assets for the payment of the debts of the appointor; consequently, that

POWER OF APPOINTMENT—*continued.*
he was not entitled to priority as regards the fund over the other creditors.
Decision of Joyce J., [1902] 2 Ch. 673, affirmed.
In re Newnham's Estate, W. N. (1881) 69, distinguished. *In re* LAWLEY. ZAISER *v.* LAWLEY - - - - - **C. A. 799**

—— Remoteness—"Possibility on a possibility" *See* PERPETUITY. **650**

PRACTICE—*Costs—Taxation—Drawing Bills of Costs — Company — Winding-up — Companies Winding-up Rules, April*, 1892, *r.* 17.
The costs of drawing bills of costs are allowed where there is litigation, or where there is a quasi-litigation (e.g., an application for payment out of a fund or to determine the construction of a will), but are never allowed where the order is to tax a bill already delivered, or the order is one as between the solicitor and his own client for delivery of a bill and its taxation.
The rule is applicable in the case of the costs of a liquidator in a voluntary winding-up. *In re* NATIONAL BANK OF WALES - **Buckley J. 412**

2.——*Jurisdiction—English Contract—Foreign Defendant—Assets in Foreign Country—Receiver —Service out of the Jurisdiction—Necessary or Proper Parties—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*g*).
Since the Court has the same jurisdiction with regard to any contract made, or equity between, persons in this country, respecting lands or assets in a foreign country, as it has where the lands or property are situate in England, to allow service of the writ out of the jurisdiction in a case within the terms of Order XI., r. 1 (*g*), is not to extend the jurisdiction, but to enable the old jurisdiction to be exercised in cases where formerly this jurisdiction could not have been exercised by reason of defective rules of procedure.
In an action against (1) a Dutch corporation, trustees of a debenture deed, (2) the receivers appointed under this deed, resident in England, and (3) an English company having property and assets in Brazil, to enforce an alleged prior equitable charge, made in England, upon property and assets in Brazil, and now vested in the first defendant:—
Held, that as the first defendants were necessary and proper parties to the action, within the terms of Order XI., r. 1 (*g*), and that as the Court had jurisdiction to grant the relief asked, service of the writ on the first defendant ought to be allowed; and, on the application of the plaintiffs, a receiver of the assets in the debenture deed was also appointed. DUDER *v.* AMSTERDAMSCH TRUSTEES KANTOOR - - **Byrne J. 132**

PRESCRIPTION—Support, Right of—Easement of necessity - - - - **557**
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PRINCIPAL AND AGENT—Equitable mortgagee — Conflicting equities — Priority — Estoppel - - - - **163**
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PRIORITY—Equitable mortgagee — Conflicting equities—Estoppel—Receipt clause **163**
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—— Partnership action—Solicitor—Lien for costs —Charging order - - - **344**
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—— Portions—Mortgage - - - **117**
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PRIVATE INTERNATIONAL LAW—Covenant to settle after-acquired property—Marriage with foreigner — Domicil — Law applicable - - - - **333**
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—— Onus of proof—Trade-mark—Rectification of register - - - - **1**
See TRADE-MARK. 1.

—— Withdrawal of proof—Certificate—Application to restore proof - - **684**
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PROSPECTUS — Fraudulent — Non-disclosure of promoter's interest—Damages - **809**
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—— Omission of material contract — Waiver clause - - - - **628**
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—— Omission of material contract — Waiver clause - - - - **456**
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PUBLIC AUTHORITIES PROTECTION—Costs—"Solicitor and client"—Electric lighting - - - - - **585**
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PUBLIC HEALTH—Water supply—"Domestic purposes"—Swimming-bath—School
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QUALIFICATION—Bankrupt director—Holding shares "in his own right" - **502**
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QUIET ENJOYMENT—Covenant for—Personal covenant - - - - **635**
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RAILWAY—"*Accommodation Works*"—*Grant of Easement—Level Crossing—Extent of Landowner's Right of User—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 16, 68–76.
Under the provisions of the Railways Clauses Consolidation Act, 1845, for the construction by

RAILWAY—*continued.*
a railway company of "accommodation works" for the benefit of a landowner whose land is severed by the railway, the landowner is entitled to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway causes by severance in the working or use of his land, including any alteration or extension of that working or use which could or ought to have been contemplated by the parties when the accommodation works were made and accepted.
Great Northern Ry. Co. v. *M'Alister*, [1897] 1 I. R. 587, 602, approved and adopted.
A railway severed the land of a landowner and crossed on the level a road belonging to him upon which he had a tramway by which goods and traffic from his land were conveyed to a neighbouring port. He had also allowed coals to be conveyed along the tramway to the port from a colliery not situate on his land. On the occasion of the purchase by the railway company of the portion of the road crossed by the railway and of other land belonging to him taken by the company, the company entered into an agreement with him that they would construct and maintain certain works "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway." These works included a level crossing for the tramway. The level crossing was constructed, and the company entered into a deed of covenant with the landowner in accordance with the agreement. The landowner's successor in title afterwards claimed to be entitled to convey over the level crossing goods and traffic brought on to her land from other places, whether situate on her estate or not:—
Held, by the Court of Appeal, that she was not entitled to use the level crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at or previously to the date of the deed of covenant, or as since enjoyed by her or her predecessors in title, if, owing to acquiescence or otherwise, that subsequent enjoyment was binding on the company.
Decision of Kekewich J. reversed. GREAT WESTERN RAILWAY COMPANY *v.* TALBOT
C. A. 759

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REDEMPTION—Clog on equity of—Option to purchase mortgaged stock - 479
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SCHOOLS—*School Board—Pupil Teachers' Centres — Higher Education — School Building — Local Rates — Expenditure — Ultra Vires — Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75).

It not being within the powers of a school board to expend money raised by local rate upon any education other than elementary—*Reg.* v. *Cockerton*, [1901] 1 K. B. 726—the London School Board was restrained by injunction from expending moneys arising from the local rates of the metropolis in the erection of a building as a "pupil teacher centre," that is, a school for providing pupil teachers with an education beyond what was strictly elementary. DYER *v.* LONDON SCHOOL BOARD - - - C. A. 768

—— Water supply — "Domestic purposes" — Swimming-bath - - - 746
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SETTLED LAND—*Electric Lighting Installation—Capital Money, Application of—Additions and Alterations with a view to Letting—Tenant for Life and Remainderman—Settled Land Acts*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25; 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s. ii.*

The word "additions" in s. 13, sub-s. ii., of the Settled Land Act, 1890, means structural additions; and, therefore, an electric light installation, even if exclusive of fittings such as would be ordinarily supplied by a tenant, is not an addition to a building within the sub-section.

SETTLED LAND—*continued.*

In re Gaskell's Settled Estates, [1894] 1 Ch. 485, followed.

In re Freake's Settlement, [1902] 1 Ch. 97, not followed. *In re* CLARKE'S SETTLEMENT
Buckley J. 327

2. —— *Investment—Capital Moneys—Investment on Mortgage—Tenant for Life—Trustees for Purposes of Settled Land Acts—Inquiry into Title and Value—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*i.*); *s.* 22, *sub-s.* 1.

Upon a direction under s. 22, sub-s. 2, of the Settled Land Act, 1882, given by the tenant for life to the trustees for the purposes of the Settled Land Act to invest capital moneys in their hands upon a specified mortgage of real estate, the Court declared that the trustees were not bound to invest upon the mortgage unless and until they were satisfied that the direction had been given upon a proper investigation as to title, and upon a proper report as to the value of the proposed security, and upon proper advice as to the form of the mortgage, and that on being so satisfied the trustees were bound to make the investment.

Order of Cozens-Hardy J., [1901] 2 Ch. 790, varied. *In re* HOTHAM. HOTHAM *v.* DOUGHTY
C. A. 575

3. —— *Investment of Capital Moneys—Broker, Right to choose — Tenant for Life—Trustees — Right to choose Broker—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 2; *s.* 31.

Upon an investment of capital moneys arising under the Settled Land Acts, the tenant for life is not entitled to dictate to the trustees of the settlement as to what broker they shall employ in the matter. The trustees may select their broker as well as their solicitor. *In re* DUKE OF CLEVELAND'S SETTLED ESTATES - Joyce J. 350

4. —— *Leasing, Power of—Mining Lease—Varying Minimum Rent—Way-leave—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, *sub-s.* 2; *s.* 9, *sub-s.* 1 (*i.*, *ii.*); *s.* 17, *sub-s.* 1; *s.* 53.

A tenant for life, in granting a mining lease, under the power conferred upon him by the Settled Land Act, 1882, may reserve an acreage rent with a minimum rent commencing in the second year of the term granted, and increasing year by year during the early part of the term.

The lease may also provide for the cesser of the minimum rent, when all the minerals demised have been paid for at the acreage rent reserved, and may also contain a grant of a way-leave for foreign minerals to continue during the whole term, and subject to a nominal rent after the cesser of the minimum rent.

Decision of Byrne J. reversed. *In re* ALDAM'S SETTLED ESTATE - - - C. A. 46

5. —— *Mansion-house—Capital Moneys—Rebuilding principal Mansion-house — Dry-rot — Salvage — General Jurisdiction of Court — Incumbrance affecting Settled Land — Expense of Sewering, &c., new Streets—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* (*ii.*); *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*iv.*)

Where the principal mansion-house on settled

SETTLED LAND—*continued.*
land had become infested with dry-rot, and expense to a large amount had to be incurred in rebuilding portions of the house in order to save the whole from destruction, the Court allowed the application of capital money in the rebuilding to the extent of one-half of the annual rental of the settled land under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, but declined to exercise its general jurisdiction by allowing the balance of the amount as being expenditure in the nature of salvage.

Expenses incurred by a local authority in sewering, paving, and flagging new streets on settled land were charged under statutory powers on the land, and made payable, together with interest thereon, by instalments:—

Held, that the expenses so charged constituted an incumbrance affecting settled land payable out of capital moneys under s. 21, sub-s. (ii.), of the Settled Land Act, 1882; and that out of capital moneys the tenant for life was entitled to repayment of such portion of past instalments paid by him as represented capital, and the trustees ought to pay the corresponding portion of the remaining instalments. *In re* LEIGH'S SETTLED ESTATE - **Kekewich J. 274**

6. —— *Mansion-house — Tenant for Life — Trust to keep up Mansion-house and permit A. to reside.*

A testatrix devised certain mansion-houses to trustees upon trust to keep up the same, and the gardens and grounds thereof, in a fit state for residence, paying the wages of all servants and persons employed by them for that purpose, and to permit her daughter at any time or from time to time during her life to reside at any of the said mansion-houses, and during such residence to pay her an annuity of 80*l.* a week:—

Held, that the daughter had the powers of a tenant for life under the Settled Land Acts. *In re* BARONESS LLANOVER'S WILL. HERBERT *v.* FRESHFIELD - - **Swinfen Eady J. 679**

SETTLEMENT—*Covenant to Settle After-acquired Property—Bequest to Separate Use—Restraint on Anticipation—Marriage with Foreigner—Domicil—Law applicable.*

Under a gift to a woman by will of a legacy payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture shall be paid to her for her separate use when and as the same shall become due and payable, and so that she shall not have power to deprive herself of the benefit thereof by anticipation, the legatee is at the date of the payment entitled to have the legacy paid to her, and the restraint on anticipation then ceases to operate; and a covenant by her, contained in an ante-nuptial settlement executed before the death of the testator, to settle after-acquired property is effectual to bind the property when transferred to her.

In re Currey, (1886) 32 Ch. D. 361, distinguished.

The matrimonial domicil was Italian. The settlement was in English form, and void under Italian law. The wife's domicil had been English, and the settled funds were English:—

Held, on the facts, that the settlement was governed by English law. *In re* BANKES. REYNOLDS *v.* ELLIS - - - **Buckley J. 333**

2. —— "*Die without having been Married*"—*Ultimate Trust for Next of Kin of Wife—Construction of Settlement.*

By a marriage settlement a fund was settled in the events of there being no child of the marriage who, being a son, should attain the age of twenty-one, or being a daughter should attain that age or marry, and of the wife dying in the lifetime of the husband, upon such trusts as the wife should by will or codicil appoint, and in default of appointment upon trust for such person or persons as under the Statute for the Distribution of Intestates' Effects should or would have been entitled to her personal estate "in case she had died intestate without having been married." The wife died intestate in the lifetime of the husband, leaving an only son who died an infant:—

Held, that the case was governed by *Wilson* v. *Atkinson*, (1864) 4 D. J. & S. 455; that in conformity with that decision the words referring to death "without having been married" must be construed as intended to exclude the husband, and not as intended to exclude a child, and that therefore on the death of the wife intestate her infant son became entitled as her sole next of kin. *In re* MARE. MARE *v.* HOWEY **Kekewich J. 112**

—— Voluntary — Trustee in bankruptcy — Evidence—Recital—Admissibility. **360**
See FRAUDULENT CONVEYANCE.

SEVERANCE—Support, Right of—Dock—Easement of necessity—Enjoyment clam **557**
See SUPPORT.

SEWERS—Capital moneys — Rebuilding mansion-house—Dry-rot—Salvage - **274**
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"**SHARE**"—Direction for settlement of "the share" of one of the class—Death of legatee before period of distribution **66**
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SHAREHOLDERS AND SHARES.
See Cases under COMPANY.

SOLICITOR—*Costs—Taxation—"Disbursement"—Estate Duty, including in Bill—Practice—Solicitor and Client—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-ss.* 1, 2; *s.* 8, *sub-s.* 16; *s.* 22, *sub-s.* 1 (*d*)—*Application by Third Parties—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 38, 39.

A payment for estate duty made by a solicitor on behalf of his client ought not to be included in his bill of costs as a "disbursement" within the meaning of s. 37 of the Solicitors Act, 1843.

Decision of Byrne J. reversed.

In re Lamb, (1898) 23 Q. B. D. 5, overruled.

Per Byrne J.: There is no general rule that the costs of applications for taxation under ss. 38 and 39 of the Solicitors Act, 1843, must in all cases follow the result of the taxation. *In re* KINGDON & WILSON - - - **C. A. 242**

2. —— *Costs — Taxation — Disbursements — Allowances—Deposit as Security for Costs of Discovery—Rules of Supreme Court*, 1883. *Order* XXXI., *rr.* 25, 26.

Deposits paid by a solicitor on behalf of his

SOLICITOR—*continued.*
client as security for costs of discovery under Order xxxi., rr. 25, 26, and not repaid, are not disbursements within s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and are not properly included in the solicitor's bill of costs.
They should be entered in the solicitor's cash account.
Decision of Kekewich J. reversed. *In re* Buckwell & Berkeley - - C. A. 596

3. —— *Lien for Costs—Partnership Action—Money in Court and in hands of Receiver—"Property Recovered or Preserved"—Judgment Creditor—Charging Order—Priority—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.
In a partnership action where a receiver had been appointed, a judgment creditor of the partnership firm obtained an order, following *Kewney* v. *Attrill*, (1886) 34 Ch. D. 345, giving him a charge for his debt and costs upon the assets in or to come into the hands of the receiver, the creditor undertaking to deal with the charge according to the order of the Court. Upon an application by the solicitor of the plaintiff in the action for a charging order for his costs under s. 28 of the Solicitors Act, 1860, in priority to the judgment creditor:—
Held, that the solicitor was entitled to succeed.
Semble, an order in the form of *Kewney* v. *Attrill* only operates as a charge as among the creditors of the partnership themselves, or as against the several partners of the firm. Ridd *v.* Thorne - - - - Joyce J. 344

—— Company—Winding-up—Private examination—Attendance of solicitor — Undertaking not to disclose - - 73
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—— Costs — Leaseholds — "Deducing title"—Single document - - - 551
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—— Costs—Public authorities protection—"Solicitor and client" - - - 585
See Corporation.

—— Liability for fraud of co-partner—Novation—Election - - - - 404
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—— Money lent to solicitor without security with notice—Summary order on solicitor
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SPECIFIC PERFORMANCE—Executory contract—Damages—Breach of trust - 606
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—— Mistake — Sale by auction — Purchase of wrong lot - - - - 266
See Vendor and Purchaser. 4.

—— Nomination—Consent or refusal by continuing partners - - - 735
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9 Geo. 2, c. 36, s. 3—*Charitable Uses* - 642
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1 & 2 Vict. c. 110, s. 14—*Judgments* - 502
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STOCKBROKER—*General Lien—Securities of Customer.*

Documents relating to shares belonging to a customer were held by stockbrokers to secure a specific advance of 15,000*l.* When this amount was repaid the documents were left with the

STOCKBROKER—*continued.*

brokers, and on subsequent transactions on the Stock Exchange by the customer, acting through the same brokers, losses were made for which the customer was liable to the brokers:—

Held, that although the specific purpose of the deposit had been satisfied by the repayment of the 15,000*l.*, the brokers had a general lien on the shares for the amount due in respect of the Stock Exchange transactions. *In re* LONDON AND GLOBE FINANCE CORPORATION
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See ECCLESIASTICAL LAW.

SUPPORT—*Easement of Necessity—Right of Support—Implied Reservation—Severance of two Tenements held by Common Owner—Prescription—Enjoyment* Clam—*Right to Support of Side of Dock.*

In 1860 a dock and a wharf to the west of it, and divided from it by a fence, belonged to the same owner. In order to secure the side of the dock, he in that year carried a number of tie-rods under the ground beneath the fence and beneath the surface of the wharf for a distance of about 15½ feet to the west of the fence, the rods being there fastened by nuts to piles which were driven into the soil of the wharf. The tie-rods were not visible; but two nuts on piles were visible on the western side of the camp-sheathing which held up the side of the wharf.

In 1877 the then owners of both properties conveyed the wharf to the plaintiffs, without any express reservation of a right of support for the dock. In 1886 the same owners conveyed the dock to the defendants' predecessors in title. In 1900 the plaintiffs, in making some excavations in the wharf, became for the first time aware of the existence of the tie-rods:—

Held, by Romer and Stirling L.JJ., Vaughan Williams L.J. dissenting, (1) that, when the wharf was conveyed to the plaintiffs, there was no implied reservation of a right of support to the dock, and that the tie-rods did not remain vested in the grantors as part of or appurtenant to the dock; (2) that the owners of the dock had not acquired an easement of support by length of enjoyment, the enjoyment having been *clam*, and that consequently the plaintiffs were entitled to remove the tie-rods from their land.

Decision of Cozens-Hardy J., [1901] 2 Ch. 300, affirmed.

Per Vaughan Williams L.J.: The tie-rods

SUPPORT—*continued.*
formed a corporeal part of the dock, and were reserved with it as appurtenant thereto.

Moreover, the enjoyment of the support was not *clam*, because the plaintiffs had the means of knowledge.

Per Romer L.J.: The easement of support was not one of necessity, and therefore a reservation of it could not be implied.

A prescriptive right to an easement over another man's land can be acquired only when the enjoyment has been open—that is, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of the enjoyment.

Per Stirling L.J.: An easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property.

It is established by *Dalton* v. *Angus*, (1881) 6 App. Cas. 740, that, in order that an easement may be gained by prescription, it must be proved that the person against whom it is claimed had some knowledge or means of knowledge. UNION LIGHTERAGE COMPANY *v.* LONDON GRAVING DOCK COMPANY - - - - C. A. 557

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TITLE-DEEDS—Possession of—Equitable mortgage—Notice—Fraud of vendor's solicitor—Priority - - - 399
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TRADE-MARK—*Old Mark—Invented Word—Invented Article—"Special and Distinctive Word" Word distinctive of Manufacturer—Exclusive User—Patented Invention—Expiration of Patent—Rectification of Register—Motion to expunge Trade-mark—User before* 1875—*Onus of Proof—Appeal—Further Evidence—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *s.* 10.

In 1877 a chemical manufacturer registered, under the Trade Marks Registration Act, 1875, the word "Vaseline," which had been invented by him to denote a product of his manufacture, the word being registered as an old mark used by him for six years before 1877.

Upon an application made in 1900 by a rival manufacturer for the removal of the mark from the register:—

Held, by Vaughan Williams and Stirling L.JJ., Cozens-Hardy L.J. dissenting, that the word had been properly registered as a "special and distinctive word" within s. 10 of the Act of 1875, since the applicant failed to shew that the word had not been used by itself as a trade-mark before the Act, whereas the evidence shewed that the word had always been used before and since the passing of the Act to denote, not an article manufactured by a particular process, but an article identified with the name of the particular manufacturer.

Whether, when an inventor invents a new article, and at the same time invents a word to designate it, he can claim the exclusive use of that word to denote his own manufacture, *quære*.

Where a person is seeking to remove a trade-mark from the register, the onus is upon him to prove that it ought to be taken off, not upon the party registered to make out his right to retain it on the register; and especially so where the mark has been on the register for many years.

Linoleum Manufacturing Co. v. *Nairn*, (1878) 7 Ch. D. 834, distinguished.

Decision of Buckley J. reversed upon further evidence adduced, by leave, on the appeal. *In re* CHESEBROUGH'S TRADE-MARK "VASELINE" C. A. 1

2. —— *Registration—Removal from Register—Mark "calculated to deceive"—Word "Trade-mark" printed on part of Label registered as a whole.*

The fact that upon a part of a label, the whole of which is registered as a trade-mark, there is printed the word "trade-mark," is not necessarily calculated to deceive as suggesting that that part alone constitutes the trade-mark.

The Court must decide from the circumstances of the particular case before it whether the position of the word "trade-mark" is calculated to deceive, and whether, if it is, there is a reasonable probability of any one being injured by it.

Per Romer L.J.: The decision of the Court of Appeal upon this point in *In re Apollinaris Company's Trade-marks*, [1891] 2 Ch. 186, was upon a question of fact, and does not therefore bind the Court except in a case in which the facts are identical.

In 1876 a label was registered as a trade-mark by a firm of brewers as an "old mark," i.e., one which they had used for some years before December 31, 1875. In the centre of the label was a diamond or four-sided figure, and the label

TRADE-MARK—*continued.*

was surrounded by an ornamental border. Upon the diamond was printed the word "trade-mark." The firm also in 1876 registered the diamond alone as a trade-mark.

In 1900 a rival firm of brewers applied to have the label removed from the register, on the ground that the printing of the word "trade-mark" upon the diamond was calculated to deceive, as suggesting that it alone constituted the trade-mark, and that the remainder of the label might be imitated:—

Held, by the Court of Appeal, that under the circumstances the position of the word "trade-mark" upon the label was not calculated to deceive; that there was no reasonable probability of any one being injured by it; and that there was no ground for removing the label from the register.

Decision of Kekewich J. (founded upon *In re Apollinaris Company's Trade-marks*, [1891] 2 Ch. 186), reversed. *In re* REGISTERED TRADE-MARKS OF BASS, RATCLIFFE & GRETTON, LIMITED (No. 2) **C. A. 579**

3. —— *Registration for an entire Class—User for part of Class—Bonâ fide Intention to use—Dormant Mark—Rectification of Register—Limitation to part of Class—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 90.

Where a trader has registered a mark for an entire class, and, many years after registration, it is proved that he has never used the mark in connection with a particular article in that class, though his business included the sale of that article under other trade-marks, the register may be rectified, upon the application of another trader desiring to register a similar mark for the particular article, by excluding that article from the specification of goods in respect of which the mark was originally registered, on the ground that at the date of registration there had been no actual user of the mark, and no bonâ fide intention of using it for that particular article of the class for which the mark had been registered.

Principle of *Edwards* v. *Dennis*, (1885) 30 Ch. D. 454, applied. *In re* REGISTERED TRADE-MARK NO. 22,206 OF MAURICE JOHN HART **Byrne J. 621**

TRADE NAME—Company—Corporate name—Separate user—Right to protection **354**
See COMPANY. 7.

TRAMWAY — *Substantial Commencement of "Works"—Cesser of Powers—Evidence—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 18.

In s. 18 of the Tramways Act, 1870, which provides that the powers of promoters under a provisional order shall cease "if within one year from the date of the order the works are not substantially commenced," the term "works" means physical works actually executed.

A corporation, who had obtained a provisional order for the construction of electric tramways, had done no work within the year on the tramway itself, but had purchased land for offices and a generating station, and had entered into binding contracts for the supply of electric cars and for the supply and installation of dynamos and electric machinery:—

Held, by the Court of Appeal, that the works

TRAMWAY—*continued.*

had not been substantially commenced within the meaning of the section.

Decision of Swinfen Eady J. reversed.

Sect. 18 also provides that "a notice, purporting to be published by the Board of Trade in the *Gazette* to the effect . . . . that the work has not been substantially commenced . . . . shall be conclusive evidence for the purposes of this section of such . . . . non-commencement."

Held, by the Court of Appeal, that, in the absence of such a notice, other evidence of the non-commencement of the works was not excluded.

Decision of Kekewich J. in *In re Dudley and Kingswinford Tramways Co.*, (1893) 63 L. J. (Ch.) 108; 69 L. T. 711, disapproved. ATTORNEY-GENERAL *v.* BOURNEMOUTH CORPORATION **C. A. 714**

TRUST—Administration of assets—Trust dehors the will of specified part of residue **220**
See ADMINISTRATION. 2.

TRUSTEE—*Breach of Trust—Interest, Rate of—Trust Moneys employed in Trade.*

It is still the rule of the Court that a trustee who employs trust moneys in trade or speculative transactions must account for the profit he makes by such employment or, at the option of the cestuis que trust, be charged with interest at the rate of 5 per cent. *In re* DAVIS. DAVIS *v.* DAVIS **Farwell J. 314**

2. —— *Breach of Trust—Money lent to Solicitor without Security with Notice—Summary Order on Solicitor—Practice.*

In an administration action it appeared that the trustee had lent moneys of the trust estate without security to his solicitor, who had accepted the loan with notice that it was trust money. The solicitor was not a party to the action:—

Held, that the Court, in the exercise of its summary jurisdiction over its officers, had power, on motion in the action, to order the solicitor to bring the money into court.

In such a case the notice of motion should be entitled in the action and in the matter of the particular solicitor. *In re* CARROLL. BRICE *v.* CARROLL - - - - **Farwell J. 175**

3. —— *Investment—Breach of Trust—Shares in Limited Company—Reconstruction—Exchange of Shares in Old Company for Shares in New Company—Retainer of Shares—"Present Form of Investment."*

The testator authorized his trustees to retain any part of his estate "in its present form of investment." At the time of his death he held 750 fully paid ordinary shares of 5*l.* each in a limited company which had no preference shares. These shares were of great value, and the trustees retained 520 of them. The company was subsequently reconstructed; the old company was wound up voluntarily, and a new company formed with the same name. All the assets of the old company were transferred to the new company; the new company carried on the business as before, and allotted to each member of the old company, in exchange for every fully paid share in the old company, one ordinary share of 5*l.* and one preference share of 5*l.* in the new company credited as fully paid. No alternative terms were offered by which shareholders might have received pay-

TRUSTEE—*continued.*
ment in cash instead of in shares. The trustees accepted the shares allotted to them in exchange for their shares in the old company. The preference shares in the new company were at the date of the hearing within the investment clause in the will. The question was whether the trustees had power to retain the ordinary shares in the new company:—
Held, that the ordinary shares in the new company were within the words "in its present form of investment," and that the trustees were justified in retaining them. *In re* SMITH. SMITH *v.* LEWIS - - - - **Buckley J. 667**
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—— Trust for sale—Appropriation—Reconversion—Election—Purchase by trustee for sale - - - - - **296**
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UNDERTAKING—Not to disclose—Company—Winding-up—Private examination—Attendance of solicitor - - **73**
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USER—Right of—"Accommodation works"—Grant of easement—Level crossing **759**
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USES, STATUTE OF—Real estate—Conveyance — Grant — Exception — Uncertainty — Election - - - - **523**
See CONVEYANCE.

VENDOR AND PURCHASER—*Contract—Voidable Contract—Assignment of Contract—Privity of Contract—Money had and received, Action for.*
A vendor having assigned the benefit of his contract for sale, payments were made, as under the contract, by the purchaser to the vendor's assignee. Subsequently to those payments the purchaser refused to complete the contract on the ground of misrepresentation by the vendor, and the assignee then brought an action for specific performance, making the vendor and the purchaser defendants, which action was dismissed.
A counter-claim by the purchaser to recover the payments made by him to the plaintiff was, upon the facts, dismissed with costs, the decision of Cozens-Hardy J., [1901] 2 Ch. 594, being reversed. FLEMING *v.* LOE - - - **C. A. 359**

2. —— *Costs—Sale—Leaseholds—Abstract of Title—"Deducing Title"—Single Document—Lease—Solicitor and Client—Costs—Scale Charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order under, Sched. I., Part I.—Practice—Taxation—Vendor and Purchaser Summons, Raising Question of Taxation on—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).
On a sale of leaseholds, the delivery of an abstract of the vendor's title consisting of the lease only is not "deducing title" so as to entitle the vendor's solicitor to the scale charge under Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881.
Wellby v. *Still*, [1894] 3 Ch. 641, followed.
Semble, per Romer L.J.: A question as to the amount of the vendor's costs on a sale is not properly raised upon an ordinary summons under the Vendor and Purchaser Act, 1874, the solicitor not being a party to and therefore not bound by the proceedings. Such a question should be raised on taxation. *In re* WEBSTER AND JONES' CONTRACT - - - - **C. A. 551**

3. —— *Priority—Equitable Mortgage—Notice—Fraud of Vendor's Solicitor—Legal Estate—Possession of Title-deeds—Forged Receipt.*
Prior to the completion of a purchase in August, 1899, the purchaser's solicitors discovered the existence of an equitable mortgage of January, 1897, not disclosed by the abstract, and required it to be discharged; on completion of the purchase, the vendor's solicitor, who was also the solicitor of the equitable mortgagee, produced the deed creating the equitable mortgage with what purported to be a receipt, signed by the mortgagee, for all moneys due on the security; an assignment of the property by the vendor to the purchaser, passing the legal estate, was executed, and the equitable mortgage with the receipt and all the other title-deeds were handed to the purchaser. The receipt on the equitable mortgage was a forgery, and on an action being brought by the equitable mortgagee against the purchaser to establish the priority of his charge:—
Held, that as the defendant had purchased with notice of an incumbrance which, as a fact, was still subsisting, the legal estate and possession of the title-deeds afforded no protection, and that the plaintiff's equitable mortgage therefore had priority, and could still be enforced against the defendant. JARED *v.* CLEMENTS
Byrne J. 399

4. —— *Specific Performance—Mistake—Sale by Auction—Purchase of wrong Lot.*
At a sale by auction of landed property the defendant purchased one lot by mistake for another. The price was not extravagant, and the mistake was solely due to the defendant's own carelessness:—
Held, no defence to an action for specific performance.
Semble, *Malins* v. *Freeman*, (1836) 2 Keen, 25;

VENDOR AND PURCHASER—*continued.*

44 R. R. 178, is inconsistent with the principle of *Tamplin* v. *James*, (1880) 15 Ch. D. 215. VAN PRAAGH *v.* EVERIDGE - - **Kekewich J. 266**

5. —— *Specific Performance—Trustees, Sale by—Repurchase by one Trustee—Executory Contract—Damages—Breach of Trust—Purchaser's Nominee.*

Trustees contracted to sell real estate to the defendant for 800*l.* Before the date fixed for completion, the defendant contracted to resell the same property to D., one of the trustees, at the same price, and required the conveyance to be made to D. as sub-purchaser, or as his nominee. D. subsequently declined to complete. In an action by the trustees for specific performance by the defendant of the first contract, the only defence was a counter-claim by the defendant for specific performance by D. of the second contract, or damages for the breach thereof:—

Held, applying the dictum of Mellish L.J. in *Parker* v. *McKenna*, (1874) L. R. 10 Ch. 96, at p. 125, that so long as the first contract was executory only, the defendant having neither paid his purchase-money nor taken up his conveyance, the trustee, D., could not repurchase the property from his own purchaser, and the counter-claim could not be enforced; neither was the defendant entitled to damages, as he must be deemed to have known that D. was incapable of purchasing under the circumstances.

Though a purchaser may, as a general rule, require a conveyance to a nominee, he cannot require a conveyance to one of the vendors under circumstances which may expose them to the risk of being parties to a breach of trust. DELVES *v.* GRAY - - - - **Byrne J. 606**

6. —— *Title — Lease — Outstanding Legal Estate in Crown—Condition limiting Time for sending in Requisitions—Waiver of Objection—Objection as to Root of Title.*

In 1884 two leases were granted to a company from which the present vendors derived title. In the same year the company went into liquidation for the purposes of reconstruction, and sold all its assets, including the leases, to a new company of the same name; but there was no formal assignment of the leases, and the old company was shortly afterwards dissolved. In 1901 these leases were sold by order of the Court, subject to conditions which limited the time for sending in requisitions and objections to title. After the prescribed period the purchaser objected that the vendors had shewn no legal title to the leases. The lessor had received rent from the new company and its successors in title from 1884 until the present time, and the vendors offered to procure the consent of the lessor to the assignment of the leases to the purchaser:—

Held, that the purchaser was precluded by the conditions from insisting upon his objection as to the outstanding legal estate (which had become vested in the Crown as bona vacantia), inasmuch as the objection related, not to the root of the title, but to the subsequent devolution thereof. PRYCE-JONES *v.* WILLIAMS **Joyce J. 517**

7. —— *Title — Open Contract — Leasehold House—Breach of Covenant to Repair—Production of Receipt for Rent—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 4.

The defendant on July 1, 1901, entered into an open contract with the plaintiff for the purchase of a leasehold house. The lease contained a covenant by the lessee to keep the house in good repair. No time was fixed for completion but the Court held that November 6 was the date on which the title was cleared up and the purchaser might have taken possession. On September 27 the vendor was served with a notice from the London County Council requiring him to pull down or render secure a part of the premises as being a dangerous structure. On November 9 the vendor was served with an order of the police court requiring him to do the repairs mentioned in the notice within fourteen days. This summons was taken out by the vendor for a declaration that the expense of complying with the order ought to be borne by the purchaser:—

Held, that, the contract being open, the purchaser was entitled to proof that all the covenants in the lease had been performed up to November 6; that s. 3, sub-s. 4, of the Conveyancing Act, 1881, which requires the purchaser, on production of the receipt for the last payment of ground rent, to assume that all covenants have been performed, "unless the contrary appear," did not apply, for the contrary did appear; and that the vendor must pay the cost of complying with the order. *In re* HIGHETT AND BIRD'S CONTRACT - - - **Swinfen Eady J. 214**

8. —— *Title—Will—Construction—Trust for Sale — Reconversion — Election — Leaseholds — Annuities—Appropriation—Purchase by Trustee for Sale.*

On a contract for sale of leaseholds the purchaser objected that the vendor at the time when he bought the property was himself a trustee for sale. Sir R. Macfarlane by his will gave all his real and leasehold estate, including the property in question, to his son Robert and J. Cockerell upon trust for sale, and to stand possessed of the proceeds upon trust to appropriate investments to answer annuities for his wife, his daughter Magdalen, and his son Henry. The testator gave his residue to his son Robert, and died in 1843. Henry was at this time incapable of managing his own affairs, and so continued down to the time of his death. In 1843 Lady Macfarlane was appointed an additional trustee, and the property was vested in Robert, Cockerell, and her, subject to the provisions of the will. In 1847 a new trustee was appointed in place of Cockerell by deeds which recited that the property subject to the trusts included the leaseholds, and conveyed them specifically to the new trustees upon the trusts of the will. Robert executed a power of attorney in favour of Lady Macfarlane, and she let the property on several occasions. Robert died in October, 1849, leaving all his property equally to Lady Macfarlane, Magdalen, and Henry; and in 1850 Lady Macfarlane was appointed administratrix of his estate with the will annexed. In 1853 she became the sole trustee; and in 1859 and 1866 she let the leaseholds for terms of years. She died in 1873,

VENDOR AND PURCHASER—*continued.*

leaving all her property to Magdalen and appointing her sole executrix. Magdalen died in 1877, leaving her property to Sir C. Douglas, and appointing him and another executors. All the property remaining subject to the trusts of the will of Sir R. Macfarlane thus became vested in Sir C. Douglas, and he paid into court to the account of Henry certain funds on an affidavit which stated that after the death of Sir R. Macfarlane his trustees got in all his real and personal estate, and appropriated 40,000*l.* Bank Annuities and the leaseholds in question to answer the annuities, and transferred the residue to Robert. In 1878 Henry was found of unsound mind by inquisition, and the master reported that the leaseholds in question belonged half to Henry and half to Sir C. Douglas absolutely, subject to Henry's annuity of 500*l.* In 1887 Sir C. Douglas died, and his will was proved by G. C. Douglas, one of his executors. In 1888 Henry (acting by his committee) and G. C. Douglas, by a deed which recited that they were absolutely entitled in moieties to the property, and that the master had approved of the deed, let the property for twenty-one years. Henry died in 1892, and letters of administration to his estate were granted to Gertrude Begbie, one of his next of kin. By a deed of May 19, 1893, which recited that G. C. Douglas was surviving trustee of the will of Sir R. Macfarlane, G. C. Douglas, as trustee, at the request of Gertrude Begbie, and in consideration of 3000*l.* paid by G. C. Douglas to her, and being himself entitled as beneficial owner to the other half of the property, assigned the leaseholds to H. P. Leach. By an indenture of May 20, 1893, H. P. Leach, as trustee and at the request of G. C. Douglas, assigned the premises to him. On September 19, 1901, G. C. Douglas agreed to sell the property to Powell for 12,200*l.*, and the purchaser took the objection that in 1893 G. C. Douglas was a trustee for sale of the property, and could not purchase the half of it which was then conveyed to him:—

Held, that, if any appropriation had taken place, it was an appropriation of unauthorized securities, and was not effectual to destroy the trust for sale; that until Henry was found a lunatic there could be no election by the beneficiaries; that there had been no election to take in specie by the Court on behalf of the lunatic; that it was not proved that there had been an election by all the persons interested; that the trust for sale did not come to an end when the annuities ceased, was not void for perpetuity, and was operative in 1893; and that the title ought not to be forced on the purchaser. *In re* Douglas and Powell's Contract - - **Byrne J. 296**

9. —— *Title—Failure to shew—Misdescription—Latent Defect—Underground Culvert for Water.*

Land was sold subject to a condition that, "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

The purchaser bought the land for building purposes, and this was known to the vendors.

VENDOR AND PURCHASER—*continued.*

They represented to him that it was suitable for building, and that there was no restriction as to the class of houses to be erected. Before he entered into the contract the purchaser inspected the property. Some time after the contract he discovered that there was an underground culvert for water running across the land. There was nothing in the plan which was shewn to him to indicate the existence of this culvert, and the vendors, who were trustees of a former owner, were not aware of it. In the opinion of the Court, no reasonable inspection would have enabled the purchaser to discover the culvert:—

Held, that the above condition did not apply, and that the culvert was a substantial drawback to the use of the land for building purposes, so that the purchaser would not get that for which he contracted:

Held, therefore, that *Flight* v. *Booth*, (1834) 1 Bing. N. C. 370; 41 R. R. 599, applied, and that a good title had not been shewn by the vendors in accordance with the contract.

Decision of Kekewich J. affirmed.

In re Brewer and Hankins' Contract, (1899) 80 L. T. 127, distinguished. *In re* Puckett and Smith's Contract - - - **C. A. 258**

VOLUNTARY ASSOCIATIONS—Will—Charitable uses - - - - - **642**
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WAIVER — Prospectus — Omission of material contract—Waiver clause - - **456**
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WAIVER CLAUSE — Prospectus — Omission of material contract - - - **628**
See Company. 10.

WATER—*Supply*—"*Domestic Purposes*"—*Swimming-bath—School—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 53—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 56, 57.

The governors of a school, carried on as a charity and not for purposes of profit, constructed a swimming-bath for the use of the boys. The bath was in a building outside the main building of the school, but was connected with it by a corridor, and was separately rated for poor-rate. A swimming master was kept to teach the boys swimming, and a fee was charged for the use of the bath. This fee was compulsory for the boarders, but was charged to such only of the day boys as used the bath:—

Held, by the Court of Appeal (Vaughan Williams L.J. doubting), that under the circumstances the water supplied to the bath was not

WATER—*continued.*

supplied for "domestic purposes," within the meaning of s. 12 of the Waterworks Clauses Act, 1863, but was supplied for the business of the school, and that consequently the water authority were entitled to make a special charge for the supply.

Decision of Buckley J., [1901] 2 Ch. 13, reversed.

Semble, that a supply of water to a swimming-bath for the use of the occupier of a dwelling-house and his family may be a supply for domestic purposes.

Per Vaughan Williams L.J.: A supply of water for domestic purposes is not limited to a supply inside the dwelling-house of the occupier, nor must it be a supply which is essential to the occupation, or even to the healthy occupation, of the house.

Water supplied for the purpose of making the occupation of a house more convenient, or for increasing its amenities, is primâ facie supplied for "domestic purposes."

Per Romer L.J.: The true test whether water is supplied for domestic purposes is not whether it is used by the occupier for the private purposes of himself and his household.

Regard must be had to the ordinary habits of domestic life and to what can reasonably be considered a "domestic purpose."

The test of reasonableness ought also to be applied to the quantity of water required, and regard should be had, not only to the consumer, but also to the obligation of the water authority to afford a supply to their district for ordinary domestic purposes.

In each case the Court must see whether the supply required is reasonably a supply for domestic purposes. BARNARD CASTLE URBAN DISTRICT COUNCIL *v.* WILSON - C. A. 746

2. ——*Underground Stream—Channel defined but not known.*

If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water.

The Sweet Well Spring was one of the principal feeders of the Morton Beck, on the banks of which the plaintiffs were riparian proprietors. The water flowed from the spring to the beck in a visible channel above ground. The spring was alleged to be fed by underground water flowing in a defined channel, but the course and existence of this channel were not known, and could not be ascertained except by excavation. The defendants by sinking wells above the Sweet Well Spring diverted the underground supply and diminished the flow of water from the spring:—

Held, that the plaintiffs had no cause of action. BRADFORD CORPORATION *v.* FERRAND Farwell J. 655

—— Title — Misdescription — Latent defect — Underground culvert for water - 258
See VENDOR AND PURCHASER. 9.

WAY, RIGHT OF—*Grant — "Executors, Administrators, and Assigns, Undertenants and Servants"—Licensees.*

A grant of a right of way extends to all lisensees of the grantee lawfully going to and from the dominant tenement, although the grantee, "his executors, administrators, and assigns, undertenants and servants," are the only persons specified in the grant. BAXENDALE *v.* NORTH LAMBETH LIBERAL AND RADICAL CLUB, LIMITED - - - Swinfen Eady J. 427

WAY-LEAVE—Tenant for life—Power of leasing — Mining lease — Varying minimum rent - - - - - 46
See SETTLED LAND. 4.

WILL—*Class—Gift of Residue to Members of a Class living at Period of Distribution—Direction for Settlement of "the Share" of one of the Class—Death of Legatee before Period of Distribution—Construction of Will.*

A testatrix, who died in 1854, by her will, made in 1849, directed the income of her residuary estate to be paid to her sisters, S. and C., in equal shares, during their joint lives, or until one of them should marry or die, and after the death or marriage of either, then to the other, during her life, or until she should marry, and after the death or marriage of such surviving or last marrying sister the testatrix directed that, subject to trusts which she declared of a sum of 1000*l.*, her residuary estate should be held in trust for all or such one or more of her brothers and sisters (except her sister E., but including S. and C., if they or either of them should marry) who should be living at the death or marriage of such surviving or last marrying sister, in equal shares, if more than one, as tenants in common. And (after providing for the event of her brothers, or either of them, being dead, or either of her sisters, S. and C., having previously married, being dead at the death or marriage of such her surviving or last marrying sister) the testatrix directed that with respect to "the share" of her sister H. "the same share" should be held in trust to pay the income thereof to her during her life, for her separate use, and after her death the capital of "the same share" should be held in trust for her child or children, as she should by deed or will appoint, and in default of appointment in trust for and to vest in her child or all her children, if more than one, being sons at twenty-one, and being daughters at twenty-one or marriage, and if more than one in equal shares.

At the date of the will the testatrix had living three brothers and four sisters, two of whom, S. and C., were unmarried, and the other two, E and H., were married. S. and C. never married. C. died in 1900, having survived all her brothers and sisters. H. died in 1884. She had had four children, all of whom attained twenty-one; but they all died before C. Neither the brothers nor the sister E. left issue:—

Held, upon the construction of the above clauses, coupled with other parts of the will, that by the expression "the share" of H. was meant an aliquot part of the estate of the testatrix, and not merely the share which H. would have taken if she had survived her sister C., and that,

WILL—*continued.*

consequently, the representatives of the deceased children of H. were entitled to the residue.

Decision of Byrne J. reversed.

In re Roberts, (1885) 30 Ch. D. 234, *In re Pinhorne*, [1894] 2 Ch. 276, and *In re Powell*, [1900] 2 Ch. 525, considered. *In re* WHITMORE. WALTERS *v.* HARRISON - - **C. A. 66**

2. —— *Class, Gift to a—Gift over on Death coupled with a Contingency—"Die leaving Issue"—Death at any time—Divesting—Defeasibility, Period of—Construction of Will.*

A testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income for the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter should attain that age or marry. Subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common:—

Held, affirming Joyce J., [1901] 2 Ch. 338, that children who survived the testator only took vested indefeasible interests if and when they should die—that is, die at any time—without leaving issue. *In re* SCHNADHORST. SANDKUHL *v.* SCHNADHORST - **C. A. 234**

3. —— *Condition—Devise of Real Estate—Condition that Devisee should take and use Testator's Name—Preceding Life Estate—Lunacy and Death of Devisee during Life of Tenant for Life—Non-performance of Condition—Condition Precedent or Subsequent—Remainder in Fee—Vesting.*

Testator by his will, dated in 1853, devised his real estate to his daughter for life, and after her death for her children; and if she should have no child the testator devised his real estate to N., on condition that he should take and use the testator's name only. The testator died in 1853. His daughter, who was now in her fifty-ninth year, was married, but had had no issue. N. died in 1855 without having taken the testator's name. For eighteen months previous to his death he had suffered from insanity, and for six months previous to his death had been in an asylum:—

Held, that whether the condition were precedent or subsequent, its performance had not been rendered impossible by the act of God; and that N. having failed to perform it, the devise to him could not take effect. *In re* GREENWOOD. GOODHEART *v.* WOODHEAD - - **Joyce J. 198**

4. —— *Illegitimate Children—Gift to Children Nominatim—Gift to Next of Kin of Children under the Statute of Distributions—Construction of Will.*

A testator gave a legacy to each of his seven children by name, and directed that, in the events which happened, his residuary estate should be

WILL—*continued.*

held upon trust for such of his seven children thereinbefore named as should be then living and should attain twenty-one; and he directed his trustees to retain the legacy and the share of residue which any daughter might take under the will, and to hold the same upon trust to pay the income to the daughter for life, and then to her husband for life if she should so appoint, and subject thereto in trust for her children, and in default of children in trust for the persons who at the death of such daughter would have been entitled to such share under the Statute of Distributions in case she had died possessed thereof without having been married. Three of the children were born to the testator by his wife before her marriage:—

Held, reversing the decision of Kekewich J., [1901] 2 Ch. 578, that the share of an illegitimate married daughter, who died without having exercised her power of appointment in favour of her husband and without having had any issue, passed to those who would have been her next of kin if she and the testator's other children had all been legitimate.

In re Standley's Estate, (1868) L. R. 5 Eq. 303, overruled. *In re* WOOD. WOOD *v.* WOOD **C. A. 542**

5. —— *Intestacy—Administration—Will becoming inoperative—Death of Sole Legatee and Executrix—Hotchpot—Statute of Distributions*, 1671 (22 & 23 *Car.* 2, *c.* 10), *s.* 5.

The provisions of s. 5 of the Statute of Distributions, directing advancements made by an intestate in his lifetime by portions to his children to be brought into account in the administration of his estate, apply to an intestacy occasioned by a will becoming wholly inoperative in consequence of the death of the sole executrix and legatee in the lifetime of the testator, as well as to an intestacy occasioned by the non-existence of any will.

Decision of Buckley J., [1902] 1 Ch. 218, affirmed. *In re* FORD. FORD *v.* FORD **C. A. 605**

6. —— *Substitutionary Gift—Gift in Remainder—Death "before becoming entitled"—Entitled "in Possession" or "Interest"—Construction of Will.*

The testatrix gave all her property to trustees upon trust for her son R. for life, and on his decease she specifically devised certain freeholds to her several grandchildren, the children of R.; she then directed her trustees to pay the income of her residue to her son's widow for life, and after the death of the widow to divide the residue amongst all the children of her said son; and in the event of either of her grandchildren "dying before becoming entitled to any share of my estate hereinbefore in any way disposed of," she directed that the child or children of such deceased grandchild should take the parent's share, or, if there should be no such child or children, then that such share should vest equally in all her surviving grandchildren. The testatrix died leaving her son R. and eight grandchildren, his sons and daughters, surviving:—

Held, that the word "entitled" meant "entitled in possession," that the substitutionary clause was operative and might take effect at any

4.

WILL—*continued.*

time during the subsistence of the preceding life estate, and that the devises to the grandchildren were not indefeasibly vested, but were subject to be defeated or destroyed so long as the prior tenancy for life existed.

Commissioners of Charitable Donations and Bequests v. *Cotter*, (1841) 1 D. & War. 498; 58 R. R. 298, not followed. *In re* MAUNDER. MAUNDER *v.* MAUNDER - - Joyce J. 875

7. —— *Uncertainty—Gift for Life with Direction to dispose of Estate according to verbally expressed Wishes—Parol Evidence—Admissibility—Avoidance of Gift for Uncertainty—Construction of Will.*

Testator by his will appointed his wife sole executrix, and gave her his property for life. He then desired and empowered her by her will or in her lifetime to dispose of his estate "in accordance with my wishes verbally expressed by me to her":—

Held, that parol evidence could not be admitted to shew what the testator's verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty.

In re Fleetwood, (1880) 15 Ch. D. 594, distinguished. *In re* HETLEY. HETLEY *v.* HETLEY Joyce J. 866

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